

3/14/98
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STEVE TEACHMAN,

Defendant.

CIVIL ACTION NO. 97CV1065H

ENTERED ON DOCKET

DATE 3-20-98

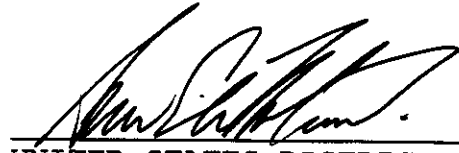
AGREED JUDGMENT

This matter comes on for consideration this 19th
day of February, 1998, the Plaintiff, United States of America, by
Stephen C. Lewis, United States Attorney for the Northern District
of Oklahoma, through Loretta F. Radford, Assistant United States
Attorney, and the Defendant, Steve Teachman, appearing pro se.

The Court, being fully advised and having examined the
court file, finds that the Defendant, Steve Teachman, was served
with Summons and Complaint on January 28, 1998. The Defendant has
not filed an Answer but in lieu thereof has agreed that Steve
Teachman is indebted to the Plaintiff in the amount alleged in the
Complaint and that judgment may accordingly be entered against
Steve Teachman in the principal amount of \$1,267.51, plus accrued
interest in the amount of \$24.15, plus interest thereafter at the
rate of 8% per annum until judgment, plus filing fees in the amount
of \$150.00, plus interest thereafter at the current legal rate
until paid, plus the costs of this action.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the
Plaintiff have and recover judgment against the defendant in the

principal amount of \$1,267.51, plus accrued interest in the amount of \$24.15, plus interest thereafter at the rate of 8% per annum until judgment, plus filing fees in the amount of \$150.00, plus interest thereafter at the current legal rate until paid, plus the costs of this action.


UNITED STATES DISTRICT JUDGE

APPROVED;

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney


LORETTA F. RADFORD
Assistant United States Attorney


STEVE TEACHMAN

LFR/jmo

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CAROLYN S. ALFRED,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,

Defendant.

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

No. 95-C-623-J ✓

ENTERED ON DOCKET

DATE 3-20-98

ORDER

Now before the Court is Plaintiff's Motion for an award of attorney's fees and other expenses. Defendant filed a response on March 16, 1998, stating that he has no objection to Plaintiff's motion for attorney fees. The Court therefore **GRANTS** Plaintiff's motion and awards Plaintiff's counsel \$2,625.00 in attorney fees and costs.

Plaintiff's attorney agrees to refund the smaller award of attorneys fees, pursuant to the Equal Access to Justice Act Attorney Fees for the District Court portion of this case, to Plaintiff.

Dated this 19 day of March 1998.


Sam A. Joyner
United States Magistrate Judge

20

FILED
MAR 20 1998
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

PAUL D. SHIPLEY,
SSN: 444-54-340

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

ENTERED ON DOCKET

DATE 3-20-98

No. 97-C-213-J

FILE

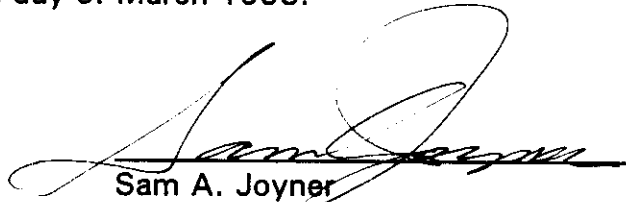
MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 19th day of March 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREA GLENN,

Plaintiff,

vs.

STATE OF OKLAHOMA, et al.,

Defendants

Case No. 96-C-384-E

ENTERED ON DOCKET

DATE MAR 20 1998

NOTICE OF DISMISSAL

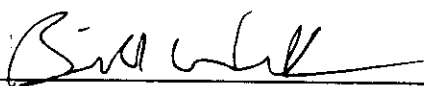
Comes now, Plaintiff, Andrea Glenn, by and through her attorney, Bill V. Wilkinson, of the Wilkinson Law Firm, and pursuant to Rule 41(a)(ii) of the Federal of Civil Procedure, hereby stipulates that defendant Robert Jackson is hereby dismissed without prejudice from the above case.

Dated this 19 Day of March, 1998

Respectfully submitted,

WILKINSON LAW FIRM

By


Bill V. Wilkinson, OBA #9621
Andrew P. DeCann, OBA #17602
7625 East 51st, Suite 400
Tulsa, OK 74145
Telephone (918) 663-2252
Fax (918) 663-2254
Attorney for Plaintiff

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOUIS RUSSELL,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

Case No. 97-CV-447-B

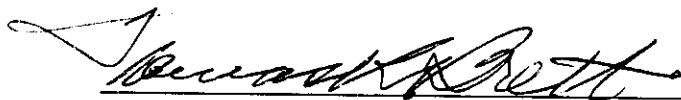
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DATE **MAR 20 1998**

JUDGMENT

In accord with the Order filed this date sustaining the Defendant's Motion to Dismiss or in the alternative Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Stanley Glanz, and against the Plaintiff, Louis Russell. Plaintiff shall take nothing on his claim. Costs are assessed against the Plaintiff, contingent upon Defendant filing timely application pursuant to the Local Rules of the Northern District of Oklahoma.

DATED THIS 19th DAY OF MARCH, 1998.


THE HONORABLE THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

PAUL D. SHIPLEY,
SSN: 444-54-340

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

ENTERED ON DOCKET

DATE 3/20/98

No. 97-C-213-J

F I L E D

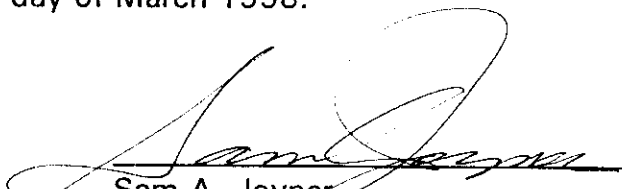
MAR 19 1998

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 19th day of March 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

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ORDER^{2/}

3/ Administrative Law Judge James D. Jordan (hereafter "ALJ") issued a partially favorable decision on June 23, 1995. He concluded that Plaintiff was not disabled prior to September 30, 1985 for the purpose of disability insurance, but was disabled from May 6, 1992 until April 1, 1994 for supplemental security insurance. [R. at 16-41]. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on January 7, 1997. [R. at 71].

evidence, and (4) the ALJ failed to properly evaluate Plaintiff's complaints of pain. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. PLAINTIFF'S BACKGROUND AND PROCEDURAL HISTORY

Plaintiff was born on October 29, 1952. Plaintiff testified that he had eight years of education and did not obtain a GED. [R. at 57]. Plaintiff claimed that he was disabled due to low back pain, leg pain, and knee pain. [R. at 61, 66, 69].

Plaintiff's first hearing before the ALJ occurred on June 8, 1993. [R. at 53]. The ALJ, by order dated July 28, 1993, concluded that Plaintiff was not disabled. [R. at 357]. Plaintiff appealed to the Appeals Council, and the Appeals Council remanded the case to the ALJ for further consideration of Plaintiff's complaints due to additionally submitted medical evidence. [R. at 411-12]. (Plaintiff had had his second back surgery on July 14, 1993).

Plaintiff's second hearing before the ALJ occurred on December 16, 1994. [R. at 94]. The ALJ issued a partially favorable decision on June 23, 1995. [R. at 16].

Plaintiff applied for disability insurance and supplemental security income ("SSI"). Plaintiff is insured only through September 30, 1985. Therefore, to qualify for disability insurance, Plaintiff must establish that he was disabled prior to September 30, 1985. Plaintiff additionally applied for SSI. Plaintiff's SSI application was filed on May 6, 1992, and therefore Plaintiff can qualify for SSI only from May 6, 1992.

The ALJ noted that Plaintiff had submitted no medical evidence indicating any disability prior to September 30, 1985. The ALJ concluded that Plaintiff therefore did not qualify for disability insurance. The ALJ reviewed Plaintiff's two back surgeries

and based on the letters submitted from Plaintiff's treating physician concluded that Plaintiff was disabled from May 6, 1992 until April 1, 1994 pursuant to SSI. The ALJ found that Plaintiff was not disabled after April 1, 1994.

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

The Commissioner has established a five-step process for the evaluation of social security claims.^{4/} See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A).

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

III. REVIEW

Disability Prior to 1985

Plaintiff does not specifically address whether Plaintiff appeals the ALJ's decision that Plaintiff was not disabled prior to September 30, 1985. The ALJ noted that Plaintiff had no medical records suggesting an impairment during this time period and that Plaintiff could not meet even the Step Two severity requirement of the sequential evaluation. The Court concludes that the ALJ's decision is supported by substantial evidence. Plaintiff was not disabled prior to the expiration of his insured status in September 1985.

Consideration of Additional Medical Evidence

Plaintiff initially asserts that the ALJ erred by failing to consider additional evidence which supported that Plaintiff had impairments to his back and knee. Plaintiff notes that he submitted additional evidence regarding his condition for the time period just before and just after April 1994.

Although Plaintiff emphasized that the ALJ "refused" to reveal these records, the record does not indicate that these records were before the ALJ for consideration. The records referenced by Plaintiff were considered by the Appeals Council. In an attachment to the Appeals Council order, the Appeals Council noted that it considered the records "in addition to that which was before the Administrative Law Judge." [R. at 9]. This would indicate that the records were not before the ALJ.

The Appeals Council concluded that the records provided no basis for changing the decision of the ALJ. The ALJ relied, in part, on Plaintiff's own treating physician. By letter dated April 1, 1994, Benjamin G. Benner, M.D., and Plaintiff's surgeon stated:

I had a chance to look over the myelogram that was performed March 29, 1994. I reviewed the Radiologist's report of the myelogram and postmyelogram CT scan. This was compared to previous myelogram studies. At the present time it appears that we have corrected all of the abnormalities seen. I do not see any signs of persistent compression that would result in the need for further surgery. It may be that pressure on the nerve produced some internal scarring which is producing long term effects. Perhaps with more time this will improve but right now I do not see any evidence for need of further surgery. It also appears that you can seek employment, but you should be limited to maximum lifting of about 30 pounds and avoid a job which involves a lot of flexing, bending, squatting, or twisting.

[R. at 418] (emphasis added). Therefore, on April 1, 1994, Plaintiff's own physician informed Plaintiff that he saw no further abnormalities and no further need for surgery. Further, he concluded that Plaintiff could work but should not lift over 30 pounds. Plaintiff does not explain why this opinion should be disregarded.

Plaintiff was additionally examined, on August 18, 1994, by a social security examining physician. The physician noted that Plaintiff's gait, tandem, and heel/toe walk were normal. He observed that Plaintiff probably had a torn lateral meniscus. Based on his examination he concluded that Plaintiff could walk unassisted for one mile, lift 20-30 pounds and sit for eight hours out of a work day. [R. at 427].

Plaintiff additionally objects that the ALJ did not adequately consider later submitted exhibits relating to his knee. Plaintiff had surgery for a torn medial meniscus on December 23, 1996. However, the existence of a condition is insufficient to establish a disability. The limitations from a condition are evaluated to determine whether Plaintiff has a disability. In this instance, the record does not contain any additionally limitations placed on Plaintiff due to the torn and repaired medial meniscus. In addition, as noted above, the examining physician considered Plaintiff's torn meniscus in his findings with respect to Plaintiff's limitations.

Listing ^{6/} 1.05

Plaintiff notes that his impairments are substantially equal to Listing 1.05(C) and Listing 1.03.

Listing 1.05(C) provides:

Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least three months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

^{6/} At step three, a claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1, commonly referred to as the "Listings." An individual who meets or equals a Listing is presumed disabled.

1. Pain, muscle spasm, and significant limitation of motion of spine; and

2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.05(C) (emphasis added). Listing 1.03 provides:

Arthritis of a major weight-bearing joint (due to any cause):

With history of persistent joint pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination. With:

A. Gross anatomical deformity of hip or knee (*e.g.* subluxation, contracture, bony or fibrous ankylosis, instability) supported by X-ray evidence of either significant joint space narrowing or significant bony destruction and markedly limiting ability to walk and stand; or

B. Reconstructive surgery or surgical arthrodesis of a major weightbearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.03 (emphasis added). As noted above, the examining physician noted that Plaintiff had full range-of-motions, and was able to walk and stand.

Plaintiff does not specify the evidence in the record which supports his claim that he meets a Listing. The ALJ evaluated Plaintiff's record with the assistance of the testimony of medical doctor (at the hearing) and concluded that Plaintiff did not meet a Listing. [R. at 28, 119]. The ALJ's conclusions are supported by substantial evidence.

Light Work and Substantial Evidence

Plaintiff asserts that the ALJ's decision that Plaintiff could perform a degree of light work is not supported by substantial evidence. Plaintiff states that he cannot repetitively lift more than five pounds, stand for more than ten minutes, or use his hands repetitively. Plaintiff asserts that the ALJ's finding that he could perform light work is wrong.

As noted above, the ALJ primarily relied on Plaintiff's own treating physician. Plaintiff's treating physician, on April 1, 1994, released Plaintiff to return to work noting that Plaintiff should not lift over 30 pounds. The medical examiner from the social security office supported the treating physician's conclusions. In addition, a medical doctor who reviewed Plaintiff's file testified at the hearing. An RFC Assessment completed on September 30, 1992, noted that Plaintiff could lift 20 pounds frequently, 10 pounds occasionally, stand or walk six hours out of an eight hour day, and sit six hours out of an eight hour day. [R. at 164].

The Plaintiff testified that he occasionally drove, that he sometimes went to WalMart, and that he fished on occasion. [R. at 61, 63]. During the three months preceding the June 1993 hearing, Plaintiff stated that the longest distance that he walked was two blocks. [R. at 71]. Plaintiff believed that he could sit for 25 - 30 minutes. [R. at 71]. Plaintiff stated that he could lift up to 40 pounds, but that it would hurt his back. [R. at 80].

An ALJ is not required to accept the limitations that a claimant states that he or she has as true. In this case, the ALJ evaluated the testimony of the Plaintiff,

considered the medical evidence, reviewed the opinions of the treating and examining and testifying physicians, and concluded that Plaintiff was capable of performing some degree of work. The ALJ's conclusions are supported by "substantial evidence," and therefore cannot be disturbed by this Court on appeal.

Evaluation of Pain

Plaintiff states that the ALJ discounted Plaintiff's complaints of pain. Plaintiff notes that the ALJ had pain from his right knee and his back, but that the ALJ discounted Plaintiff's complaints "without substantial evidence to the contrary."

The legal standards for evaluating pain are outlined in 20 C.F.R. §§ 404.1529 and 416.929, and were addressed by the Tenth Circuit Court of Appeals in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987). First, the asserted pain-producing impairment must be supported by objective medical evidence. Id. at 163. Second, assuming all the allegations of pain as true, a claimant must establish a nexus between the impairment and the alleged pain. "The impairment or abnormality must be one which 'could reasonably be expected to produce' the alleged pain." Id. Third, the decision maker, considering all of the medical data presented and any objective or subjective indications of the pain, must assess the claimant's credibility.

[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence.

Id. at 164. In assessing the credibility of a claimant's complaints of pain, the following factors may be considered.

[T]he levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Hargis v. Sullivan, 945 F.2d 1482, 1488 (10th Cir. 1991). See also Luna, 834 F.2d at 165 ("For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication.").

The mere existence of pain is insufficient to support a finding of disability. The pain must be considered "disabling." Gosset v. Bowen, 862 F.2d 802, 807 (10th Cir. 1988) ("Disability requires more than mere inability to work without pain. To be disabling, pain must be so severe, by itself or in conjunction with other impairments, as to preclude any substantial gainful employment."). Furthermore, credibility determinations by the trier of fact are given great deference. Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992).

In this case, the ALJ noted that Plaintiff had a driver's license and had driven two days prior to the hearing with his longest drive consisting of 20 miles. [R. at 25]. The ALJ observed that Plaintiff had occasionally gone to the grocery store and out to

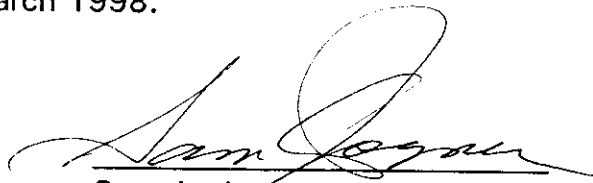
eat, that he had attended a few school functions. [R. at 26]. The ALJ noted that Plaintiff did not use a wheelchair, walker, cane, or other assistive device, and that Plaintiff had not used a TENS unit. [R. at 26]. Plaintiff had described his limitations as being able to walk ten minutes, stand 10 minutes, sit 30 minutes, lift 30 pounds (once), and five pounds repetitively.

The ALJ noted that he was considering all of Plaintiff's testimony because the medical evidence did not contain clinical findings which supported Plaintiff's allegations of disabling pain. [R. at 27]. The ALJ noted that based on his review and the testimony of the medical expert at the hearing, Plaintiff's treating physician and the examining physician generally agreed that Plaintiff could work. [R. at 29]. The ALJ noted that Plaintiff, at the hearing, testified that he had drowsiness as a result of taking Tylenol 3, but that Plaintiff had not complained of drowsiness to his doctors. [R. at 29].

The Court has reviewed the ALJ's opinion, the transcripts, the record, and the briefs of the parties. Although the ALJ could have more thoroughly discussed Plaintiff's complaints of pain, the Court concludes that the ALJ adequately evaluated Plaintiff's complaints.

Accordingly, the Commissioner's decision is **AFFIRMED**.

Dated this 19 day of March 1998.


Sam A. Joyner
United States Magistrate Judge

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3/20/98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CAROLYN S. ALFRED,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
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Defendant.

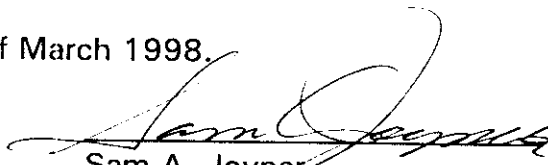
No. 95-C-623-J

ORDER

Now before the Court is Plaintiff's Motion for an award of attorney's fees and other expenses. Defendant filed a response on March 16, 1998, stating that he has no objection to Plaintiff's motion for attorney fees. The Court therefore **GRANTS** Plaintiff's motion and awards Plaintiff's counsel \$2,625.00 in attorney fees and costs.

Plaintiff's attorney agrees to refund the smaller award of attorneys fees, pursuant to the Equal Access to Justice Act Attorney Fees for the District Court portion of this case, to Plaintiff.

Dated this 19 day of March 1998.


Sam A. Joyner
United States Magistrate Judge

over
clerk
3/20/98

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LOUIS RUSSELL,

Plaintiff,

vs.

STANLEY GLANZ,

Defendant.

Case No. 97-CV-447-B

ENTERED ON DOCKET

DATE MAR 20 1998

ORDER

Before the Court for consideration is defendant's Motion to Dismiss or in the alternative Summary Judgment (Docket # 8) and the Court, being fully advised finds the same shall be granted.

Plaintiff filed his civil rights complaint pursuant to 42 U.S.C. §1983 on June 26, 1997, seeking \$5,000,000.00 in damages for violation of his constitutional rights under the eighth and fourteenth amendments to the United States Constitution. Specifically, plaintiff alleges he received improper medical care in the removal of a drainage tube by a nurse at the Tulsa County Jail following plaintiff's incarceration. The tube was present as a result of prostate surgery the plaintiff underwent in August, 1995.

Based upon unopposed motion of defendant Glanz (Docket #5), the Court entered an Order on September 15, 1997, staying the proceedings pending preparation of a 28 U.S.C. §1915 (D) Frivolity Review Report ("Special Report") from which the Court could ascertain whether there were factual or legal bases for plaintiff's claims.

Defendant's Special Report (Docket #7) was filed with the Court on November 14,

1997. On that same date, defendant filed the motion now before the Court. Response brief was due pursuant to N.D. LR 7.1 C. on December 1, 1997, however, none was filed. On December 16, 1997, the Court entered a minute order setting forth a new briefing schedule for the motion and further notifying plaintiff that failure to respond could result in dismissal of this case. Plaintiff was given until January 16, 1998, to respond. No response was ever filed nor has plaintiff ever requested an extension of time within which to respond.

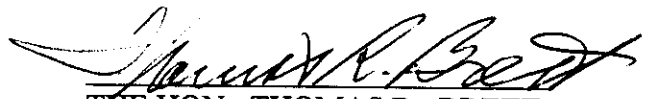
The Court has therefore reviewed the substance of the motion filed by defendant to determine if there is a valid basis for same and concludes the motion is well taken and shall therefore be granted. The evidentiary material attached to the motion in support of defendant's statement of undisputed facts provides a record which substantiates defendant's position that the medical care provided to plaintiff did not constitute cruel and unusual punishment and that defendant was provided reasonable care as required by *Goff v. Bechtold*, 632 F. 2d 697,698(S.D.W.Va. 1986). Further, there is no evidence that any alleged suffering of plaintiff was intentionally caused. The records provided establish that plaintiff wholly fails to state a claim for inadequate medical care pursuant to *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 51 (1976).

The record further establishes that plaintiff has failed to show any personal involvement, much less misconduct, on the part of defendant Glanz. Dismissal of plaintiff's claims against sheriff Stanley Glanz is therefore warranted on the merits. *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.

Ed.2d 611 (1978).

IT IS THEREFORE ORDERED that defendant's Motion to Dismiss or in the alternative Summary Judgment is granted. It is further ordered that defendant is awarded his costs to be determined upon proper application. A separate judgment in keeping with this order will be filed contemporaneously.

DONE THIS 19th DAY OF MARCH, 1998.


THE HON. THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVEN N. MORGAN,

Plaintiff,

v.

GEORGIA-PACIFIC CORPORATION,
and NALCO CHEMICAL CORPORATION,

Defendants.

Case No. 98-C-207-H

ENTERED ON DOCKET

DATE 3-19-98

FILED
MAR 18 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on a notice of removal (Docket # 1) filed jointly by Defendants Georgia-Pacific Corporation ("Georgia-Pacific") and Nalco Chemical Corporation ("Nalco"). Plaintiff Steven N. Morgan originally brought this action in the District Court of Mayes County, Oklahoma. Plaintiff's Petition alleges that Defendants are liable for injuries he sustained while delivering chemicals made by Nalco to a facility owned by Georgia-Pacific. Plaintiff was injured when he fell through open flooring in a facility which was under construction at the time. In his Petition, Plaintiff seeks damages in excess of \$10,000.¹

Defendants removed this action to this Court on the basis of diversity jurisdiction. The Defendants contend that diversity jurisdiction is properly invoked here because all parties are citizens of different states. Plaintiff is a citizen of Texas while Nalco is a Delaware corporation with its principal place of business in Illinois. Defendants allege that "upon information and belief,

¹In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000) shall, without demanding any specific amount of money, set forth only that amount sought as damages is in excess of Ten Thousand Dollars (\$10,000), except in actions sounding in contract.

Okla. Stat. tit. 12, § 2008(2).

the Defendant, Georgia-Pacific, is a Georgia corporation, with its principal place of business in Georgia." Defs.' Notice of Removal, ¶5 (Docket # 1). In its removal petition, Defendants state:

This Court has original jurisdiction of this matter by virtue of the provisions of 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and the Defendants, and, on information and belief, the amount in controversy exceeds \$75,000 exclusive of costs and interest.

Defs.' Notice of Removal, ¶6.

Section 1447 requires that a case be remanded to state court if at any time before final judgment it appears the court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c). Initially, the Court notes that federal courts are courts of limited jurisdiction. With respect to diversity jurisdiction, "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$75,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$75,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. (citation omitted). The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds [\$75,000]." (citation omitted) Moreover, there is a presumption against removal jurisdiction. (emphasis in original)

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.), cert. denied, 116 S. Ct. 174 (1995); e.g., Hughes v. E-Z Serve Petroleum Marketing Co., 932 F. Supp. 266 (N.D. Okla. 1996) (applying Laughlin and remanding case); Barber v. Albertson's, Inc., 935 F. Supp. 1188 (N.D. Okla. 1996) (same); Martin v. Missouri Pacific R.R. Co. d/b/a Union Pacific R.R. Co., 932 F. Supp. 264 (N.D.

Okla. 1996) (same); Herber v. Wal-Mart Stores, 886 F. Supp. 19, 20 (D. Wyo. 1995) (same); Homolka v. Hartford Ins. Group, Individually and d/b/a Hartford Underwriters Ins. Co., 953 F. Supp. 350 (N.D. Okla. 1995) (same); Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995) (same); Maxon v. Texaco Ref. & Marketing Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (same).

Further, “both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.” Laughlin, 50 F.3d at 873. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v. Dow Quimica de Colombia S.A., 988 F.2d 559, 565 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994) (finding defendant’s conclusory statement that “the matter in controversy exceeds [\$75,000] exclusive of interest and costs” did not establish that removal jurisdiction was proper); Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir. 1992) (mere recitation that the amount in controversy exceeds \$75,000 is not sufficient to establish removal jurisdiction).

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$75,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$75,000 at issue in the case. The removing defendant bears the burden of establishing federal court jurisdiction at the time of removal, and not by supplemental submission. Laughlin, 50 F.3d at 873. See Herber, 886 F. Supp. at 20 (holding that the jurisdictional allegation is determined as of the time of the filing of the notice of removal). And the Tenth Circuit has clearly stated what is required to satisfy that burden. As set out in Johnson v. Wal-Mart Stores, Inc., 953 F. Supp. 351 (N.D. Okla. 1995), if the face of the petition does not affirmatively establish that the amount in controversy exceeds \$75,000.00, then the rationale of Laughlin contemplates that the removing

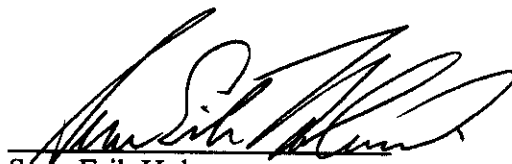
party will undertake to perform an economic analysis of the alleged damages with underlying facts.

In the instant case, in his Petition, Plaintiff has asserted only that Defendants are jointly and severally liable in an amount in excess of \$10,000. Therefore, the amount in controversy is not met by the face of the Petition. In their notice of removal, Defendants failed to set forth any specific facts that demonstrate the federal amount in controversy has been met. Accordingly, the Court finds that Defendants' conclusory assertions do not satisfy the standards set forth by the Tenth Circuit in Laughlin. The Court concludes that removal is improper on the basis of diversity jurisdiction since it has not been established, either in Plaintiff's Petition or in Defendants' notice of removal, that the amount in controversy here exceeds \$75,000.

Based upon a review of the record, the Court holds that Defendants have not met their burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Mayes County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Mayes County.

IT IS SO ORDERED.

This 18TH day of March, 1998.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ALLEN O'BRIEN

Petitioner,

vs.

GEORGE KILLINGER, Warden

Respondents.

ENTERED ON DOCKET

DATE 3-19-98

Case No. 97-CV-1030-K (M)

F I L E D

MAR 18 1998


ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

The United States' Motion to Transfer Case to Northern District of Texas [Dkt. 8] is before the Court. This action is a habeas corpus petition brought under 28 U.S.C. § 2241. A § 2241 petition attacks the execution of a sentence rather than its validity and must be filed in the district where the prisoner is confined. *Bradshaw v. Story*, 86 F.3d 164, 166 (10th Cir. 1996). Petitioner is confined at the Federal Medical Center--Forth Worth, Texas, located in the territorial jurisdiction of the United States District Court for the Northern District of Texas. See 28 U.S.C. § 124. Accordingly, this action is not appropriately before this Court and should be transferred.

The United States' motion [Dkt. 8] is GRANTED. The Court Clerk is directed to transfer the case to the United States District Court for the Northern District of Texas.

SO ORDERED this 18 day of March, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JONELL DAVIS,

Plaintiff,

vs.

HILTI, INC., a
New York corporation,

Defendant.

97-
Case No. CV-428-K (W)

ENTERED ON DOCKET

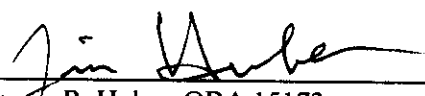
DATE 3-19-98

STIPULATION OF DISMISSAL WITH PREJUDICE

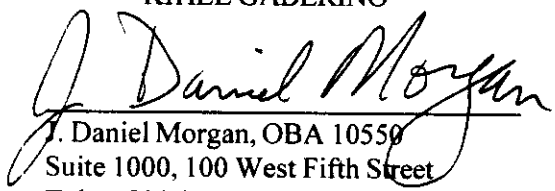
Pursuant to FRCP 41(a)(1), the parties hereby stipulate that this action is dismissed
with prejudice. Each party shall bear her/its own attorneys fees and costs.

So stipulated this 13th day of March 1998.

MALLOY & ASSOCIATES


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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TRAVIS W. BROWNING,
Plaintiff,
vs.
RIO ALGOM, INC., et al.,
Defendants.

ENTERED ON DOCKET

DATE 3-19-98

No. 97-C-405-K

FILED

MAR 19 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary. All pending motions are declared moot.

ORDERED this 17 day of March, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

46

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEROY SPANN,

Plaintiff,

vs.

RANDY COOK, et al.,

Defendants.

ENTERED ON DOCKET

DATE 3-19-98

No. 96-CV-868-K (M)

FILED

MAR 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on July 22, 1997 (doc. #12). Plaintiff did not file a response to Defendants' motion as required by the Local Rules of this Court. See N.D. LR 7.1(C).

On January 30, 1998, the Court issued its order affording Plaintiff additional time to respond to the pending motion.¹ Plaintiff was cautioned that his failure to respond to Defendants' motion may constitute a waiver of objection to the motion and a confession of the matters raised by the motion. Plaintiff was directed to file a response within twenty days of the entry of the order, or by February 22, 1998. To date, Plaintiff has failed to respond. Therefore, the Court finds that Plaintiff's failure to respond to Defendants' motion to dismiss, or in the alternative for summary judgment, constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local

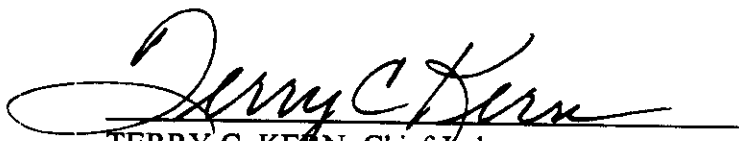
¹The January 30, 1998 Order also lifted the stay imposed to secure the special report by the Department of Corrections. The special report was filed of record simultaneously with Defendants' motion to dismiss, or for summary judgment.

Rule 7.1(C).²

ACCORDINGLY, IT IS HEREBY ORDERED that:

- (1) Defendants' motion to dismiss or for summary judgment (doc. #12) is **granted**; and
- (2) This case is **dismissed without prejudice**.

SO ORDERED THIS 18 day of March, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

²Local Rule 7.1(C) reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

TULSA LITHO COMPANY,

Debtor.

ROBERT G. GREEN,

Appellant,

v.

TULSA LITHO COMPANY,

Appellee.

Bky. No. 96-01814-W
Chapter 11

Case No. 97-C-195-K

ENTERED ON DOCKET

DATE 3-19-98

FILED

MAR 18 1998

ORDER

Phil Lombardi, Clerk
U.S. DISTRICT COURT

This order pertains to the appeal of Robert G. Green ("Green") from the January 13, 1997 order of the United States Bankruptcy Court for the Northern District of Oklahoma denying his motions for relief from stay, for imposition of constructive trust, and for administrative expense claim.

The district court has jurisdiction to hear appeals from final decisions of the bankruptcy court under 28 U.S.C. § 158(a). Bankruptcy Rule 8013 sets forth a "clearly erroneous" standard for appellate review of bankruptcy rulings with respect to findings of fact. In re: Burkart Farm & Livestock, 938 F.2d 1114, 1115 (10th Cir. 1991). However, this "clearly erroneous" standard does not apply to review of findings of law or mixed questions of law and fact, which are subject to the de novo standard of review. Id.; In re: Osborn, 24 F.3d 1199, 1203 (10th Cir. 1994). This appeal challenges the legal conclusion drawn from the facts presented at trial, so de

novo review is proper.

According to the record, Tulsa Litho Company ("TLC") is an Oklahoma corporation in the business of printing magazines and other materials. It did business with a group of California companies, including Tile & Decorative Surfaces Magazine Co., Inc., Dimensional Stone Institute, Inc., and Contemporary Dialysis, Inc., which were owned by Jerry Fisher ("the Fisher Companies"). TLC contracted to print several trade magazines for the Fisher Companies for five years. By May of 1993, the Fisher Companies had failed to pay TLC's invoices in the amount of approximately \$326,000, and TLC brought suit in Case No. 93-C-470-E in this court for breach of contract. The suit was filed for TLC by Green.

Green was not TLC's corporate general counsel, but was formally hired to represent TLC against the Fisher Companies at a meeting of the Board of Directors. The terms of his engagement were not put in writing or evidenced by minutes of the board meeting. He claims that he agreed to represent TLC in the case for a combination of 50% of his normal hourly rate of \$150.00 an hour, plus a 20% contingency fee based on recovery.

Green did not endorse "Attorney Lien Claimed" on the complaint he filed for TLC in the district court suit, because he believes that doing so in a case where he represents a business client does not indicate trust in the relationship.

Green represented TLC throughout litigation of the lawsuit. In May 1994, a jury found in favor of TLC against the Fisher Companies for damages in the amount of \$320,000. The court awarded Green all his attorney fees in the amount of

\$19,162.50. The district court did not give TLC judgment against Jerry Fisher individually, but also refused to award him any of his fees against TLC. This ruling was appealed, reversed, and remanded, and Jerry Fisher was awarded fees against TLC.

In April 1995, Jerry Fisher sued TLC and Green for malicious prosecution in Case No. CJ-95-1678 in Tulsa County District Court. This state court suit is still pending. Meanwhile, Green attempted to collect on TLC's judgment, traveling to California to depose Jerry Fisher and applying for appointment of a receiver for the Fisher Companies. The hearing on the appeal for receiver was scheduled for October 26, 1995, but the day before the Fisher Companies filed their voluntary petitions for Chapter 11 bankruptcy relief in California. TLC hired California counsel to represent it in those bankruptcies.

The stock of TLC was purchased by Superb Printing Company on March 28, 1996. On May 15, 1996, TLC filed its own voluntary petition for Chapter 11 relief in this court, represented by different counsel. In its statements and schedules filed on June 4, 1996, the judgment in favor of TLC against the Fisher Companies was listed as an asset, and there were non-priority unsecured claims in the amount of \$872,830.20 owed to more than 100 different creditors. Green was listed as a disputed, unsecured creditor.

Green was ordered to deliver to TLC's bankruptcy counsel the files and records of TLC in his possession relating to the state and district court lawsuits. He requested a protective order to protect TLC's rights. He also filed a motion to modify

the bankruptcy stay under 11 U.S.C. § 362 to allow notice of his attorney's lien as a secured claim, securing the fee for services he had performed in the district and state court suits for payment from the proceeds of a proposed settlement in the cases in the amount of \$200,000, which would constitute property of the debtor. TLC objected.

A hearing was held on November 27, 1996, and the court took the matter under advisement. Green then filed a motion to permit, in the alternative, the imposition of a constructive trust or a § 503(b)(4) claim as additional remedies to allow his lien to be recognized. TLC objected. On January 13, 1997, the court denied Green's "Motion to Modify Stay to Allow Notice of Lien to be Filed" and "Motion to Permit, in the Alternative, the Imposition of a Constructive Trust or a §503(b)(4) Claim as Additional Remedies in . . . Green's Motion to Modify Stay to Allow Notice of Lien to be Filed" and sustained TLC's objections to the motions. Green appealed.

There is only one Tenth Circuit case upon which Green relies, In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990), modified on other grounds, Abel v. West, 932 F.2d 898 (10th Cir. 1991). He argues that this case supports his claim that his failure to notice his lien prior to the filing of the bankruptcy does not prevent him from asserting it in the bankruptcy case. He contends that Western Real Estate is "on all fours with the instant case" and in it the court found that neither the confirmation of a plan nor the attorney's recovery of part of his pre-petition fees barred litigation against third parties for the remainder of the fees.

However, the facts in Western Real Estate are clearly distinguishable. That case involved an attorney who had a written retainer agreement and secured his contract fee by filing an attorney's lien under Oklahoma's attorney lien statute prior to the bankruptcy of his client. Id. at 594. He also filed his proof of claim in the bankruptcy case. Id. The issue in Western Real Estate was how the court would evaluate the treatment of a rejected executory contract for attorney fees in determining the ultimate allowance of the claim, a matter not relevant to the case at bar.

The other cases cited by Green are factually distinguishable and cannot be relied on to support a position when there is Tenth Circuit law which applies. The fees sought in In re A. Tarricone, Inc., 76 B.R. 53 (Bankr. S.D.N.Y. 1987), were for post-petition legal services rendered after the bankruptcy court authorized the employment of counsel to represent the debtor. The court in Chicago, Rock Island & Pacific R.R. Co. v. Rittenhouse, Hanson & Evans, 285 P.2d 186 (Okla. 1955), found that an attorney's charging lien makes the attorney and his client equitable joint owners of a part interest in the judgment resulting in a case. The court determined that the defendant in the case had actual knowledge of that ownership, but stated: "[h]ad the rights of an innocent third person, such as an assignee, intervened, a different question would be presented." Such is the situation in the case at bar.

The Tenth Circuit has found that if notice of a lien is not filed under a lien statute similar to that in Oklahoma, a lien is not perfected as to third parties in a bankruptcy case. Oklahoma's attorney's lien statute is found in Okla. Stat. tit. 5, §

6, and states:

From the commencement of an action, or from the filing of an answer containing a counterclaim, the attorney who represents the party in whose behalf such pleading is filed shall, to the extent hereinafter specified, have a lien upon his client's cause of action or counterclaim, and same shall attach to any verdict, report, decision, finding or judgment in his client's favor; and the proceeds thereof, wherever found, shall be subject to such lien, and no settlement between the parties without the approval of the attorney shall affect or destroy such lien, provided such attorney serves notice upon the defendant or defendants, or proposed defendant or defendants, in which he shall set forth the nature of the lien he claims and the extent thereof; and such lien shall take effect from and after the service of such notice, but such notice shall not be necessary provided such attorney has filed such pleading in a court of record, and endorsed thereon his name, together with the words "lien claimed."

In In re Electronic Metal Products, Inc., 916 F.2d 1502 (10th Cir. 1990), the Tenth Circuit reviewed a Colorado lien statute very similar to this Oklahoma statute. The court emphasized that "the validity and extent of an attorney's lien in bankruptcy is determined by state law." Id. at 1504. The court noted that the Colorado law (like Oklahoma's) distinguishes between retaining liens and charging liens. Id. at 1505. A retaining lien allows counsel to retain possession of a client's personal property, while a charging lien "permits the attorney to satisfy his fee claim out of the subject matter of the litigation." Id. The court noted that "[e]ven without filing notice, [the attorney] had a charging lien on the chose in action that produced the settlement, because as between attorney and client, the lien arises by operation of law." Id. But the court went on to find that "because [the attorney] did not file a notice of lien, it was not perfected against third parties and was therefore invalid against a trustee in bankruptcy as of the date of the bankruptcy filing under 11 U.S.C. § 545." Id.

(citations omitted).

Green admitted he had not met Oklahoma's statutory measures by filing a pleading in a court of record and endorsing on it his name and the words "lien claimed," as provided by Oklahoma's attorney lien statute. He decided to show his faith in his attorney-client relationship with TLC by declining to file such a statutory lien. He also failed to serve any other kind of notice on the third parties showing the nature of the lien he claimed and the extent of it. He claims "notice" was given to Jerry Fisher and his companies in the May 29, 1996 letter written two weeks after the bankruptcy petition was filed and the stay went into effect,¹ which Green did not write and which did not discuss the nature of the lien or its extent, as required by Oklahoma's statute.

Green also attempts to convince the court that service of his December 9, 1996, motion and brief was "notice upon the defendant" as required in Okla. Stat. tit. 5, § 6. The brief was not served on the judgment debtor defendants, the Fisher Companies, or their counsel.

Green cited several cases which have held that an attorney's lien which is valid under state law is not extinguished or voided when the client files bankruptcy. However, on May 15, 1996 when TLC filed bankruptcy, Green held no perfected attorney's charging lien enforceable against TLC. The bankruptcy court properly held

¹See Exhibit E to Green's motion filed on December 9, 1996, Record on Appeal, which is a settlement letter in the original district court case from Brian T. Corrigan, a California attorney representing the Fisher Companies in their California bankruptcies.

that relief from the automatic stay should not be granted where such relief would enable one creditor of the debtor to attain an advanced status in preference to other creditors of the estate. As the Tenth Circuit in Electronic Metal Products recognized, the relationship established by pre-petition legal representation is indistinguishable from the types of business relationships enjoyed by the bankruptcy debtor with other trade creditors. 916 F.2d at 1506.

The bankruptcy court noted that 11 U.S.C. § 362(a)(4) stays "any act to create, perfect, or enforce any lien against property of the estate." Section 362(a)(5) stays "any act to create, perfect, or enforce against property of the debtor any lien" securing a pre-petition debt. The bankruptcy court properly concluded that these provisions by their express terms stay any act to "create, perfect, or enforce any lien" which secures a pre-petition debt owed by the debtor upon property in which the estate or the debtor has an interest. It is immaterial whether the act which would operate upon property of the estate or debtor is in some sense also directed "to" a third party. The bankruptcy court found that the attempt by Green to create, perfect, or enforce his attorney's lien on settlement proceeds which would otherwise be payable to TLC was therefore stayed by § 362(a)(4) and (5).

The issue before the court was whether, or to what extent, Green's fee, if it was enforceable, was secured by an attorney's lien under Okla. Stat. tit. 5, § 6. The bankruptcy court concluded that Green did not effect a lien prior to the bankruptcy filing date, and his "notices" after the stay went into effect violated the automatic stay and were therefore void. Franklin Savings Assoc. v. Office of Thrift Supervision, 31

F.3d 1020, 1022 (10th Cir. 1994); Ellis v. Consolidated Diesel Elec. Corp., 894 F.2d 371, 372-73 (10th Cir. 1990). The bankruptcy court properly found that Green was an unsecured creditor who had "trusted TLC," as had other unsecured creditors, and all of them had to take their pro rata share of unsecured assets--including any proceeds from TLC's litigation with Fisher. The court admitted that Green had devoted several years of effort which had created a substantial fund which would inure to the benefit of TLC, as had most of TLC's other creditors. The court found no authorities to support Green's claim that he was entitled to imposition of a constructive trust on the funds.

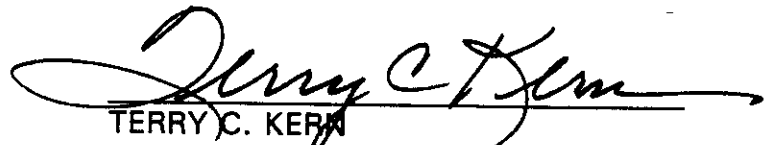
Green asks the court to use its equitable power to issue an order giving him justly-deserved fees. In United States v. Energy Resources Co., 495 U.S. 545, 549 (1990), the United States Supreme Court recognized the "traditional understanding" that bankruptcy courts are courts of equity and that under 11 U.S.C. § 105(a) they may "issue any order, process or judgment necessary or appropriate to carry out the provisions" of the Bankruptcy Code. (emphasis added). However, in Western Real Estate Fund, the court recognized the "supplementary equitable powers" granted bankruptcy courts under 11 U.S.C. § 105(a), but went on to state that such powers "may not be exercised in a manner that is inconsistent with the other, more specific provisions of the [Bankruptcy] Code." 922 F.2d at 601.

Finally, the bankruptcy court correctly found that Green was not entitled to an "administrative claim" under 11 U.S.C. § 503(b)(4). By invoking this statute, Green effectively conceded that he was not entitled to an administrative expense as an

attorney for TLC under § 503(b)(2), § 330(a), because his employment was never approved by the court, and his alleged fee agreement was not assumed by TLC as an executory contract under 11 U.S.C. § 365(a), (d)(2). Section 503(b)(4) refers to § 503(b)(3), and subparagraph (D) applies only to "a creditor . . . making a substantial contribution in a case under chapter . . . 11 of this title." Green's work was done pre-petition, so could not have made a substantial contribution in the chapter 11 bankruptcy case.

The decision of the bankruptcy court is affirmed.

Dated this 18 day of March, 1998


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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FILED
MAR 17 1998
PHIL LOMBARDI, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

**LUCILLE BOWIE o/b/o,
MARCUS BOWIE,**

Plaintiff,

v.

**KENNETH S. APFEL,
Commissioner, Social
Security Administration,**

Defendant.

Case No. 96-C-495-M

ENTERED ON DOCKET

DATE MAR 19 1998

ORDER


On September 24, 1997, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded the case to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,783.75 for attorney fees (no costs) for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees


WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$2,783.75 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

It is so ORDERED THIS 17th day of March 1998.


FRANK H. MCCARTHY
United States Magistrate Judge

SUBMITTED BY:


STEPHEN C. LEWIS
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NANCY A. BIBBS,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner, Social
Security Administration,

Defendant.

Case No. 97-C-83-W

ENTERED ON DOCKET

DATE MAR 19 1998

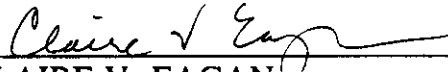
ORDER

On December 2, 1997, this Court remanded this case to the Commissioner for further administrative action. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), and defendant's response, the parties have stipulated that an award in the amount of \$1,930.50 for attorney fees (no costs) for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$1,930.50 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

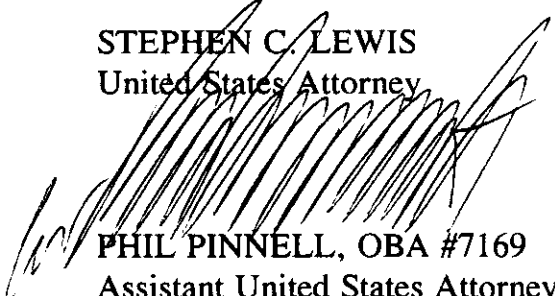
It is so ORDERED THIS 17th day of March 1998.



CLAIRE V. EAGAN
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

LESTER STEVE CLARK,

Petitioner,

vs.

SONNY SCOTT,

Respondent.

Case No. 96-CV-681-C

ENTERED ON DOCKET
DATE MAR 18 1998

ORDER

Petitioner, a state prisoner appearing *pro se* and *in forma pauperis*, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on July 26, 1996. He raises one ground for relief: his conviction for abusing and/or permitting a child to be sexually abused in violation of Okla. Stat. tit. 21, § 843 was based on an amended version of the statute which became effective after the alleged crime occurred and therefore his conviction violates the *ex post facto* clause of the United States Constitution. This matter comes before the Court on Respondent's motion to dismiss for failure to exhaust state remedies (Docket #5). Petitioner has objected. On January 26, 1998, Respondent also filed, in compliance with this Court's Order of October 9, 1997 (Docket #8), a supplemental response. To date, Petitioner has not replied to the supplemental response although the deadline imposed by the October 9, 1997 Order has passed.

BACKGROUND

On June 1, 1992, Petitioner pled guilty to lewd molestation (two counts), rape by instrumentation, sodomy, and abusing and/or permitting a child to be sexually abused, in Tulsa County District Court, Case No. CF-92-1723. The alleged incidents of sexual abuse occurred

between January 1, 1988 and January 29, 1990. Petitioner was sentenced to twenty (20) years on each of the lewd molestation counts, fifteen (15) years on the rape by instrumentation count, ten (10) years on the sodomy count, and thirty-five (35) years on the abusing and/or permitting a child to be sexually abused count, with the sentences to be served concurrently with each other.

Petitioner failed to withdraw his guilty plea or to perfect a timely direct appeal of his convictions. However, he has sought post-conviction relief in the state courts. On March 24, 1993, Petitioner filed a "Notice of Application to Vacate Judgment and Sentence" and a "Motion to Vacate Judgment and Sentence" in Tulsa County District Court. In his motion, Petitioner asserted the following grounds for relief: (1) his defense attorney, the prosecuting attorney and the trial judge failed to advise him of the full ramifications of entering a guilty plea, (2) the plea of guilty was not knowingly made by the petitioner, (3) the State failed to comply with the guidelines of King v. State, 553 P.2d 529 (Okla. Crim. App. 1976). The state court treated the motion as Petitioner's first application for post-conviction relief and, on April 14, 1993, denied the application, finding that since Petitioner had failed to file a timely direct appeal and failed to state sufficient reason to excuse such failure, the issues raised in the motion to vacate judgment and sentence had been waived. See Docket #6, Ex. C.

On April 18, 1993, Petitioner filed a Petition for Appeal Out of Time in the Oklahoma Court of Criminal Appeals. Petitioner presented the same claims raised in his Motion to Vacate Judgment and Sentence filed in the state trial court. On June 7, 1993, the Court of Criminal Appeals affirmed the state district court's denial of post-conviction relief, stating that:

Petitioner has not offered sufficient reason for his failure to file a timely direct appeal. After a thorough consideration of the entire record before us, we find no disagreement with the Trial Court's findings and conclusions. As Petitioner has failed

to show entitlement to relief in a post-conviction proceeding, the order of the District Court denying Petitioner's application for post-conviction relief is AFFIRMED.

(Docket #6, Ex. E). In other words, the Oklahoma Court of Criminal Appeals ruled that Petitioner had defaulted his claims by failing to file a direct appeal.

Petitioner next sought relief in federal district court by filing, on September 7, 1993, a petition for writ of habeas corpus, Case No. 93-C-799-B. On February 14, 1994, that petition was dismissed without prejudice for failure to exhaust state remedies.

According to the record provided by Respondent along with his supplemental response, Petitioner next filed, on March 24, 1994, a "second" application for post-conviction relief in Tulsa County District Court, styled a "petition for castration." (Docket #13, Ex. A). Petitioner sought to reduce his sentence in exchange for his castration. The state trial court denied the relief requested finding Petitioner's claim procedurally barred. (Docket #13, Ex. C). Petitioner did not appeal the trial court's decision.

Next, Petitioner filed a "third" application for post-conviction relief in Tulsa County District Court alleging (1) ineffective assistance of counsel, and (2) insufficient information as to the charging language of count VI (the abusing and/or permitting a child to be sexually abused count). See Docket #6, Ex. H. Again finding that Petitioner failed to state sufficient reason for his failure to raise those arguments in his previous applications for post-conviction relief, the state district court found the allegations of error procedurally barred and denied the "third" application for post-conviction relief.

On April 8, 1996, Petitioner filed his petition in error in the Court of Criminal Appeals. In its June 27, 1996 Order affirming the district court's denial of post-conviction relief, the appellate court stated that:

[Petitioner] has not raised any issues that could not have been raised in a motion to withdraw guilty plea, in a direct appeal of his conviction, and in his previous post-conviction proceedings. Petitioner has failed to assert any sufficient reason why the current issues could not have been adequately raised previously. Therefore, the issues may not be the basis of a post-conviction proceeding. 22 O.S. 1991, § 1086; Webb v. State, 835 P.2d 115, 116 (Okla. Cr. 1992). Accordingly, the order of the District Court denying Petitioner's application for post-conviction relief should be, and is hereby, AFFIRMED.

Docket #6, Ex. K.

In the instant petition for a writ of habeas corpus, filed on July 26, 1996, Petitioner alleges only that his conviction on count VI, abusing and/or permitting a child to be sexually abused, violates the *ex post facto* clause of the United States Constitution.

ANALYSIS

A. Exhaustion

As stated in the October 7, 1997 Order, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished if either (a) the applicant has exhausted the remedies available in the courts of the State, or (b) there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant. 28 U.S.C. § 2254(b)(1); see also White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994)

(quoting Rose v. Lundy, 455 U.S. at 518).

The Supreme Court has explained that a state prisoner can fulfill the exhaustion requirement by demonstrating that he has "provide[d] the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim It is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas claim." Anderson v. Harless, 459 U.S. 4, 6 (1982) (per curiam). This "fair presentation" requirement, however, does not go so far as to require a habeas petitioner to recite certain magic words to invoke a particular claim: "[W]e do not imply that respondent could have raised [his claim] only by citing 'book and verse on the federal constitution.' . . . We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts." Picard v. Connor, 404 U.S. 270, 278 (quoting Daugherty v. Gladden, 257 F.2d 750, 758 (9th Cir. 1958)); see also Nichols v. Sullivan, 867 F.2d 1250, 1252 (10th Cir. 1989) ("[A] failure to invoke talismanic language (cite 'book and verse' of the constitution) should not be the basis for a finding of nonexhaustion."). The Tenth Circuit Court of Appeals has held that crucial to the inquiry of "fair presentation" is whether the "substance" of the petitioner's claim was presented to the state court. See, e.g., Dernarest v. Price, 130 F.2d 922, 931-32 (10th Cir. 1997); Nichols, 867 F.2d at 1252; Jones v. Hess, 681 F.2d 688, 693 (10th Cir. 1982).

In the instant case, although Petitioner states that he "did state in his appeal to the original Post Conviction that the Elements in the statutes changed" (see Petition (#1), at 7), the Court could

find no reference to the *ex post facto* issue in the petition for appeal out of time.¹ A review of Petitioner's petition in error submitted to the Oklahoma Court of Criminal Appeals following the denial of his "third" application for post-conviction relief by the trial court reveals that Petitioner does mention the statute he now challenges, Okla. Stat. tit. 21, § 843, but primarily in support of his ineffective assistance of counsel claim.² See Docket #6, Ex. I, at B-2. In addition, Petitioner challenged the sufficiency of the Information providing the basis for his arraignment by stating that it did not allege "all essential elements of offense charged." Id., at B-4. While Petitioner may have intended this allegation to relate to his current *ex post facto* claim, the Court finds the connection simply too tenuous to satisfy the Picard "fair presentation" standard. Only in the last paragraph of the "Conclusion" did Petitioner state that he was "charged with a statute that did not even apply to this appellant because the elements changed and thus violates state and Federal Constitutional laws." Id., at B-5. However, this statement came at the very end of the state-court review process and in an application for post-conviction relief denied on the basis of a procedural bar. After reviewing the records provided by Respondent, the Court concludes that Petitioner has not "fairly presented" the instant claim to the Oklahoma Court of Criminal Appeals and has failed to meet the exhaustion requirement of 28 U.S.C. § 2254.

¹The Court notes that Petitioner believes that his first two post-conviction relief efforts did not satisfy the criteria of Okla. Stat. tit. 22, §§ 1080, et seq., and that his "third" application for post-conviction relief should be considered his "first" application. See Docket #6, Ex. I, at B-1.

²Petitioner does not bring an ineffective assistance of counsel claim in the instant habeas action.

B. Futility of Returning to State Courts to Exhaust

However, the Court's inquiry does not end here. The exhaustion requirement may be waived when a procedural doctrine in the state court would prevent a habeas petitioner from pursuing his unexhausted claim. See Harris v. Reed, 489 U.S. 255, 263 n.9 (1989) ("Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred."); see also Grey v. Hoke, 933 F.2d 117, 120 (2d Cir. 1990) (applying the futility rule in Harris to waive the exhaustion requirement of section 2254 because of a state procedural bar). As Justice O'Connor noted in her concurrence in Harris, one of the dangers in strictly applying the exhaustion requirement in cases where exhaustion would be futile is that a dismissal in such circumstances "would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him." Harris, 489 U.S. at 270 (O'Connor, J., concurring).

In the instant case, this Court has no doubt that Oklahoma's courts would refuse to consider Petitioner's *ex post facto* claim should this Court dismiss this action for failure to exhaust. Oklahoma's Post-Conviction Procedure Act as well as a well-established line of cases in Oklahoma has made it clear that Oklahoma courts may not consider a claim in a post-conviction collateral attack when the petitioner knew the facts supporting his allegation at the time of his direct appeal. 22 O.S. §§ 1080, et seq.; see also Webb v. State, 661 P.2d 904 (Okla. Crim. App. 1983), *cert. denied*, 461 U.S. 969 (1983); Maines v. State, 597 P.2d 774 (Okla. Crim. App. 1979). In addition, Oklahoma's Post-Conviction Procedure Act specifically provides that any ground for relief available to an applicant must be raised in his first application for post-conviction relief or it will be considered waived in subsequent applications. Okla. Stat. tit. 22, § 1086. Clearly, to require Petitioner to return

to the state courts to "fairly present" the instant *ex post facto* claim would be futile. The Court concludes that Respondent's motion to dismiss for failure to exhaust should be denied.

C. Procedural Bar

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined, or would decline, to reach the merits of the claim on independent and adequate state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 724 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "in the vast majority of cases." Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claim is barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claim would be an "independent" state ground because it would be "the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar would be an "adequate" state ground because the Oklahoma Court of Criminal Appeals consistently declines to review claims which were not raised in a first request for post-conviction relief. Okla. Stat. tit. 22, § 1086.

Because of his procedural default, this Court may not consider Petitioner's *ex post facto*

claims unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claims are not considered. See Coleman, 510 U.S. at 750. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging that he failed to raise his *ex post facto* claim in prior post-conviction proceedings because he "did not see the constitutional (sic) violations untill (sic) now. This petitioner being a layman of the law did not fully find the errors untill (sic) now." (Docket #1, at 7). However, it is well-established that ignorance of the law or unfamiliarity with legal terms does not constitute "cause" sufficient to overcome a procedural default. Klein v. Neal, 45 F.3d 1395 (10th Cir. 1995) (holding that petitioner's assertions he is not a lawyer and he was unaware of this statute's existence are insufficient as a matter of law to constitute "cause"); see also Cornman v. Armontrout, 959 F.2d 727, 729-30 (8th Cir.1992) (citing cases for the propositions that neither below-average intelligence, pro se status or lack of formal legal training constitute "cause"). Because Petitioner has failed to demonstrate "cause," the Court need not assess the "prejudice" component of the inquiry. Petitioner has failed to demonstrate that he may overcome his procedural default based on the "cause and prejudice" exception.

sexual abuse of a child. In addition, Petitioner does not cite a single case in which a court has relied on the "fundamental miscarriage of justice" exception to consider the merits of an otherwise procedurally defaulted challenge to a guilty plea, and independent research reveals no such cases. Thus, Petitioner has not met the exacting burden required to satisfy the "fundamental miscarriage of justice" exception. Because appellant has failed to make a colorable showing of his factual innocence, he is barred from making this claim in a collateral attack on his conviction pursuant to 28 U.S.C. § 2254.

In sum, while the Court recognizes many litigants perceive that the disposition of claims because of procedural noncompliance seems unfairly harsh and picayune, the Supreme Court has acknowledged "the significant harm to the States that results from the failure of federal courts to respect [a state's procedural rules]." Coleman, 501 U.S. at 750. Concerns of federalism and comity dictate that the federal courts give the same respect to a state's procedural rules as is given to federal procedural rules. Id. at 751.

CONCLUSION

Petitioner has failed to "fairly present" his *ex post facto* claim to the Oklahoma Court of Criminal Appeals. However to require Petitioner to return to state court to exhaust this claim would be futile since the Oklahoma Court of Criminal Appeals consistently imposes a procedural bar on claims which could have been but were not raised on direct appeal or in a first application for post-conviction relief. Where the state's highest court imposes or would impose a procedural bar based on independent and adequate state procedural grounds, this Court is precluded from considering Petitioner's claim on the merits absent a showing of "cause and prejudice" or a claim of actual or

factual innocence. Petitioner has failed to demonstrate that either exception applies. As a result, this Court is precluded from considering Petitioner's claim on the merits and the petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. Respondent's motion to dismiss for failure to exhaust state remedies (Docket #5) is **denied**.
2. This Court is precluded from considering Petitioner's claim on the merits by the doctrine of procedural default and the petition for writ of habeas corpus is **denied**.

SO ORDERED THIS 17th day of March, 1998.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREA GLENN,

Plaintiff,

vs.

STATE OF OKLAHOMA, et al.,

Defendants

Case No. 96-C-384-E

ENTERED ON DOCKET

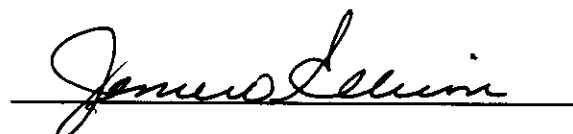
DATE MAR 18 1998

**ORDER
FOR DISMISSAL WITHOUT PREJUDICE**

Now on this 17th day of March, 1998, the Court has before it the Stipulation for Dismissal of Suit against Defendants, Rita Andrews and Larry Fields; and after careful consideration finds that said Stipulation should be granted.

IT IS HEREBY ORDERED that the lawsuit against defendants, Rita Andrews and Larry Fields, be dismissed without prejudice, and that each party bear their own attorney's fees, costs and expenses; and that prior to the refiling in any court the Defendants shall be entitled to their costs pursuant to Rule 41(d) of the Federal Rules of Civil Procedure.

Dated and entered this 17th day of March, 1998.


JUDGE OF THE DISTRICT COURT

FILED
MAR 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

ELLEN L. CAMPBELL,

Plaintiff,

v.

**KENNETH S. APFEL,
Commissioner, Social
Security Administration,**

Defendant.

Case No. 95-C-705-E /

ENTERED ON DOCKET

DATE MAR 18 1998

ORDER

On February 27, 1998, this Court affirmed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits. The case was appealed to the Tenth Circuit and the case was remanded to the district court for further proceedings.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), and defendant's response, the parties have stipulated that an award in the amount of \$3,872.00 for attorney fees and \$324.27 for costs for all work done before the district court and the circuit court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$3,872.00 attorney's fees and \$324.27 costs for a total award of \$4,196.27 under EAJA. If attorney fees are also awarded under 42 U.S.C. §406(b)(1) of

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the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986). This action is hereby dismissed.

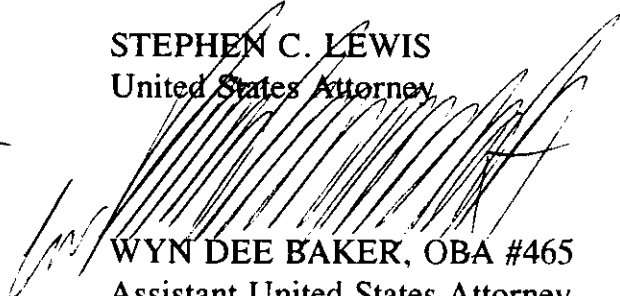
It is so ORDERED THIS 17th day of March 1998.



JAMES O. ELLISON
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


WYN DEE BAKER, OBA #465
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,

Plaintiff,

v.

CORNEAL O. HOLMAN,

Defendant.

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)
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) Civil Action No. 97CV835H(M)
)
)
)

ENTERED ON DOCKET

DATE 3-18-98

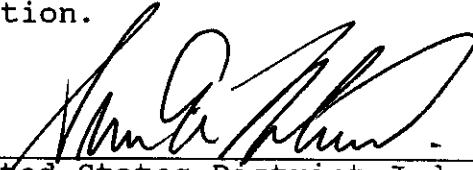
DEFAULT JUDGMENT

This matter comes on for consideration this 17TH day of MARCH, 1998, the Plaintiff appearing by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and the Defendant, Corneal O. Holman, appearing not.

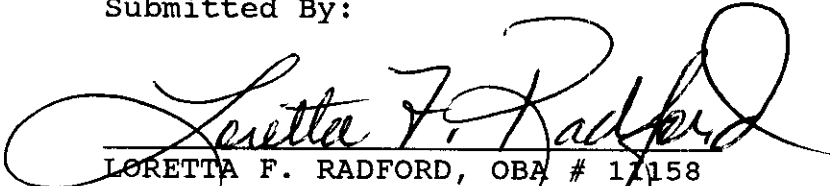
The Court being fully advised and having examined the court file finds that Defendant, Corneal O. Holman, was served with Summons and Complaint on December 3, 1997. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to Judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Corneal O. Holman, for the principal amount of \$6,207.01, plus accrued interest of \$4,215.77, plus interest thereafter at the rate of 12 percent per annum until judgment, plus filing fees in the amount of

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


LORETTA F. RADFORD, OBA # 17158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/llf

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WENDELL DENEER BAIRD,

Petitioner,

vs.

THE STATE OF OKLAHOMA,

Respondent.

ENTERED ON DOCKET

DATE 3-18-98

No. 96-CV-641-H

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the revocation of an eight (8) year suspended sentence entered in Washington County District Court, Case No. CRF-90-459. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below the Court concludes that this petition should be denied.

As a preliminary matter, the Court notes that Petitioner filed this habeas corpus action on July 15, 1996, after enactment of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Therefore, the Court finds that the amendments to the habeas corpus statutes imposed by the AEDPA apply to this case. See Lindh v. Murphy, 117 S.Ct. 2059 (1997).

I. BACKGROUND

On December 31, 1990, Petitioner pled guilty to Unlawful Distribution of a Controlled Dangerous Substance--Cocaine in Washington County District Court, Case No. CRF-90-459, and was sentenced to fifteen (15) years incarceration, with eight (8) years of the sentence suspended. Subsequently, on March 4, 1994, Petitioner was arrested and pleaded guilty to Trafficking in Illegal Drugs, After Former Conviction of a Felony, in Tulsa County District Court, Case No. CF-

94-1205. As a result of Petitioner's arrest in Case No. CF-94-1205, the State filed, on June 16, 1994, to revoke Petitioner's suspended sentence entered in CRF-90-459. The state district court granted the revocation motion on June 30, 1994. Petitioner challenged the revocation of his suspended sentence in an application for post-conviction relief filed in Washington County District Court on August 22, 1995. His request for relief was denied on March 22, 1996. Petitioner's appeal of the trial court's denial of post-conviction relief was dismissed as untimely, pursuant to Rule 5.2(C)(2), *Rules of the Court of Criminal Appeals*, 22 O.S. Supp. 1995, Ch. 18, App., by the Oklahoma Court of Criminal Appeals on May 28, 1996.

In the present petition for a writ of habeas corpus, filed on July 15, 1996, Petitioner identifies the following three errors allegedly warranting habeas relief:

- (1) The Appellate Court of Oklahoma erroneously dismissed Petitioner's appeal from his post-conviction because Petitioner had mailed the pleadings within the required time period to be filed;
- (2) District Court erred (sic) in denying Petitioner's Post-Conviction Application because Petitioner does state fundamental error in his trial proceedings to warrant reversal in the case;
- (3) Petitioner's rights to Due Process and Equal Protection of laws were violated in this case because a hearing was not held within (20) days following Petitioner's arrest on march 7, 1994.

(Docket #1). The third error identified by Petitioner was the focus of his post-conviction relief effort and is the focus of Petitioner's argument in this habeas action, i.e., that because the State failed to conduct a hearing on the revocation of his suspended sentence within twenty (20) days of his arrest on separate criminal charges, his due process and equal protection rights were violated. Petitioner's other two claims of error relate to the alleged impropriety of the state courts' imposition of a procedural bar on his claim.

II. ANALYSIS

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). The exhaustion doctrine is "principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." Harris v. Champion, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

Respondent indicates that Petitioner meets the exhaustion requirements under the law. (Docket #4, at 2, ¶ 4). However, Petitioner contends that the Oklahoma Court of Criminal Appeals erred in dismissing his appeal as untimely since he gave his petition in error to prison officials for mailing within the thirty day time period specified by the court rules. Citing Houston v. Lack, 487 U.S. 266 (1988), Petitioner argues that he did in fact timely file his petition in error and the Court of Criminal Appeals should have considered his claims. (Docket #1, at 5; Docket #6, at 2-3). Although the Oklahoma Court of Criminal Appeals does not recognize the Houston v. Lack "mailbox rule," see Behrens v. Patterson, No. O-97-1222, 1997 WL 797660 (Okla. Crim. App. Nov. 18, 1997) (publication ordered Dec. 16, 1997); Hunnicut v. State, No. PC-97-90, 1997 WL 797645 (Okla. Crim. App. May 8, 1997) (publication ordered Dec. 16, 1997),

Oklahoma procedural rules nonetheless provide a remedy for Petitioner should he believe that he was denied an appeal in a post-conviction action "through no fault of his own." See Smith v. State, 611 P.2d 276, 277 (Okla. Crim. App. 1980); Rules 2.1(E) and 5.2(A), *Rules of the Court of Criminal Appeals*. He may submit an application for an appeal out-of-time in the state district court having jurisdiction of the claim. Id. Thus, the Court finds that in this case, Petitioner has an available state court remedy and his claims are unexhausted.

However, it is well-established that where the state's highest court has decided the precise legal issue that a petitioner seeks to raise in a federal habeas petition, exhaustion of state remedies is not required. Goodwin v. State, 923 F.2d 156, 157 (10th Cir. 1991). Although in this case none of Petitioner's claims has been "fairly presented" to the Oklahoma Court of Criminal Appeals, the Court finds it would be futile to require Petitioner to return to state court since the Oklahoma Court of Criminal Appeals has previously found the central issue raised by Petitioner to be without merit. See Wilson v. State, 621 P.2d 1173 (Okla. Crim. App. 1980). Furthermore, this Court may deny an application for a writ of habeas corpus on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State. 28 U.S.C. § 2254(b)(2)

In Wilson, at 1175-76, the Oklahoma Court of Criminal Appeals addressed the precise issue of statutory interpretation raised by Petitioner in this case. The appellant in Wilson had received a five year suspended sentence on September 2, 1975 and was arrested for a separate charge four years later, on September 4, 1979. The state filed an application to revoke suspended sentence on November 8, 1979 and the revocation hearing was concluded, and the revocation order issued, on November 27, 1979. The appellant argued that the statute requires a revocation

hearing within 20 days after the convict's arrest on any charge which might afford a basis for revocation. The state statute at issue in Wilson and in the instant case provides as follows:

Whenever a sentence has been suspended by the court after conviction of a person for any crime, the suspended sentence of said person may not be revoked, in whole or in part, for any cause unless a petition setting forth the grounds for such revocation is filed by the district attorney with the clerk of the sentencing court and *competent evidence justifying the revocation of said suspended sentence is presented to the court at a hearing to be held for that purpose with twenty (20) days after the date of arrest.*

Okla. Stat. tit. 22, § 991b (1986) (emphasis added).¹ The Oklahoma Court of Criminal Appeals determined that the term "arrest" as used in § 991b refers to an arrest on the revocation or acceleration application as opposed to an arrest on a separate criminal charge. Id., at 1176.

In this case, it is Petitioner's contention that because he was arrested in Tulsa County on charges of trafficking in a controlled substance on March 4, 1994 and a hearing was not held in Washington County District Court, the court which entered the suspended sentence, until June 30, 1994, the express terms of Okla. Stat. tit. 22, § 991b were violated and Petitioner was denied due process and equal protection of the laws. However, records provided by Respondent indicate that the State filed the application to revoke suspended sentence on June 16, 1994 and the state district court revoked the suspended portion of Petitioner's sentence on June 30, 1994. (Docket #4, Exs. C and D). Based on Wilson, the hearing was held well within the twenty day period and there was no violation of Okla. Stat. tit. 22, § 991b (1986). As a result, the Court concludes that Petitioner's argument that his due process and equal protection rights were violated is baseless.

¹Okla. Stat. tit. 22, § 991b was subsequently amended, effective Sept. 1, 1994, to provide that a hearing must be held to present competent evidence justifying the revocation of a suspended sentence "within twenty (20) days after the entry of the plea of not guilty to the petition, unless waived by both the state and the defendant."

The other claims raised by Petitioner in this action relate to alleged procedural errors committed by the state courts resulting in those courts' failure to review this claim on the merits. Even if a constitutional right or violation of federal law were implicated by these allegations of error, this Court need not address the claims since Petitioner's underlying claim lacks merit. This petition for writ of habeas corpus should be denied.

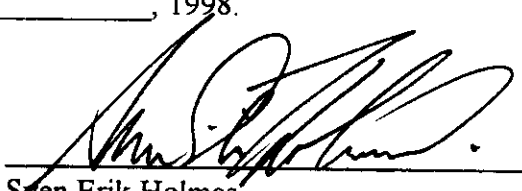
III. CONCLUSION

Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws or treaties of the United States. The petition for writ of habeas corpus should be denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is **denied**.

IT IS SO ORDERED.

This 17TH day of MARCH, 1998.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DAVINA C. DISMUKE,
SSN: 455-94-6584

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,¹

Defendant.

Case No. 96-CV-0465-EA

ENTERED ON DOCKET

DATE 3-18-98

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's partial denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 17th day of March 1998.

Claire V. Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

¹ On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Apfel is substituted for Shirley S. Chater, former Commissioner, as the defendant in this action.

58 ✓
UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

MAURICE VAN DUSEN,

Plaintiff,

v.

RICHARD'S, INC. and
DR. GEORGE MAUERMAN,

Defendants.

ENTERED ON DOCKET

DATE 3/18/98

Case No.: 97-CV-1073K (W) ✓

FILED

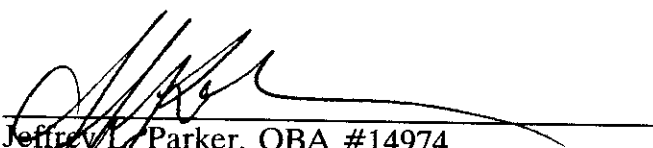
MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MOTION TO DISMISS PARTY DEFENDANT

COMES NOW the Plaintiff, Maurice Van Dusen, and herewith dismisses the
Defendant, Richard's, Inc., improperly named in this lawsuit.

RESPECTFULLY SUBMITTED,

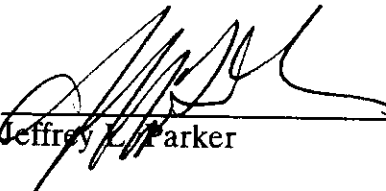

Jeffrey L. Parker, OBA #14974
PARKER, STAGGS & ASSOCIATES, P.C.
6506 South Lewis, Suite 220
Tulsa, Oklahoma 74136
(918) 748-8118

2
c/LJ

CERTIFICATE OF MAILING

I certify that on the ____ day of March 1998, I mailed a true and correct copy of the above and foregoing instrument, U.S. mail, postage prepaid, to:

Richard E. Day
c/o Richard's, Inc.
50 North Front Street
Memphis, Tennessee 38103



Jeffrey L. Parker

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BENNY L. HULSEY,

Plaintiff,

v.

DARLEN GOMEZ,

Defendant.

Case No. ⁹⁷~~96~~-C-864-H

FILED
MAR 17 1998
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 3-17-98

ORDER

This matter comes before the Court on the complaint filed by Plaintiff on September 16, 1997. No service has yet been obtained on Defendant. On February 23, 1998, the Court ordered Plaintiff to file a statement with the Court describing the good cause for failure to timely effect service. The Court further warned Plaintiff that if he did not demonstrate good cause, then his action would be dismissed without prejudice. Plaintiff did not respond to the Court's order.

Rule 4(m) of the Federal Rules of Civil Procedure, which governs time limits for service, states in pertinent part as follows:


If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice of the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend time for service for an appropriate period.

Fed. R. Civ. P. 4(m). Thus, the Court first must determine whether Plaintiff has shown good cause for the failure to timely effect service. If so, the Court must give Plaintiff a mandatory extension of time. Espinoza v. United States, 52 F.3d 838, 841 (10th Cir. 1995). However, if Plaintiff fails to show good cause, the Court "must still consider whether a permissive extension of time may be warranted. At that point the district court may in its discretion either dismiss the case without prejudice or extend the time for service." Id.

The Court finds that Plaintiff has not demonstrated good cause for failure to effect service. No action has been taken in this case to effect service or to describe to the Court the reasons for failure to timely effect service. The Court further declines to grant a permissive extension of time in which to effect service. Accordingly, this case is hereby dismissed without prejudice.

IT IS SO ORDERED.

This 13TH day of March, 1998.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANNE TERRY,

Plaintiff,

v.

CEMARA HEALTH, INC. and
JOSEPH W. KENNEDY,

Defendants.

ENTERED ON DOCKET

DATE 3-17-98

Case No. 98 CV 0118 H (M)

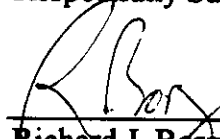
FILED
MAR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

NOTICE OF DISMISSAL

Comes now the Plaintiff, Anne Terry, and would advise the Court of its Notice of Dismissal without prejudice as to refiling as to Defendant Joseph W. Kennedy, pursuant to FRCP 41 (a)(1).

Respectfully Submitted,


Richard J. Borg OBA #10621
Attorney for Plaintiff
5514 South Lewis, Suite 101
Tulsa, Oklahoma 74105
(918) 744-0666

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid on the 15 day of March, 1998 to:

James R. Polan
Riggs, Abney, Neal, Turpen, Orbison & Lewis
502 West Sixth St.
Tulsa, Oklahoma 74119-1010


Richard J. Borg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KENNETH RILEY, an individual

Plaintiff,

vs.

SECURITY LIFE OF DENVER INSURANCE
COMPANY, a colorado corporation,

Defendant.

Case No. 97-CV-494-K(M)

ENTERED ON DOCKET

DATE 3-17-98

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

The parties hereto, by and through their attorneys of record, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), hereby stipulate that this action should be, and the same is hereby dismissed, with prejudice. Each party is to bear his or its own attorney's fees and costs.

LAYON, CRONIN & CLARK

By: 

Joseph F. Clark, Jr., OBA No. 1706
Pratt Tower - 6th Floor
125 West 15th Street
Tulsa, Oklahoma 74119

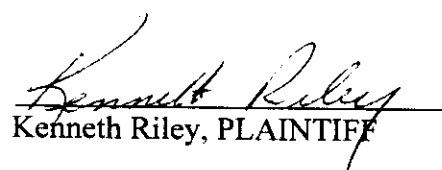
NICHOLS, WOLFE, STAMPER, NALLY,
FALLIS & ROBERTSON, INC.

By: 

Angelyn L. Dale, OBA No. 10773
Paula J. Lynch, OBA No. 15295
Suite 400 Old City Hall
124 East Fourth Street
Tulsa, Oklahoma 74103-5010
(918) 584-5182

ATTORNEYS FOR PLAINTIFF

ATTORNEYS FOR DEFENDANT


Kenneth Riley, PLAINTIFF

District
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re: Raskin Resources, Inc.,

Debtor.

Bankruptcy No. 93-00092-C
(Chapter 7)

BAP No. NO-96-33

ENTERED ON DOCKET

DATE 3-17-98

Rockwell International Corporation,

Appellant,

v.

The F&M Bank & Trust Company

Appellee.

98CV0199H (M)

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER GRANTING STIPULATION OF DISMISSAL WITH PREJUDICE

COMES NOW before the Court the Appellant's, Rockwell International Corporation's, and the Appellee's, The F&M Bank and Trust Company's, Stipulation of Dismissal With Prejudice of Appellant's appeal against the Appellee, with prejudice to refiling. The Stipulation of Dismissal With Prejudice is hereby GRANTED.



Judge of the District Court

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

GRUPO CARBALLOY, S.A. DE
C.V.,

Plaintiff,

vs.

BORN INC.

Defendant.

FILED
MAR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 97-CV-235-K

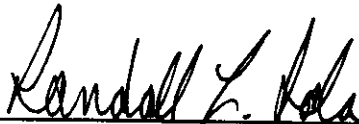
ENTERED ON DOCKET

DATE 3-17-98

STIPULATION OF DISMISSAL WITH PREJUDICE

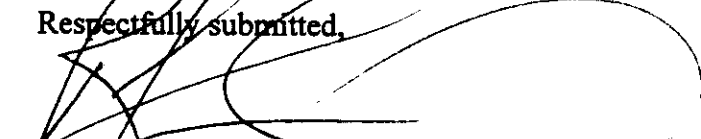
COME NOW, the Plaintiff, Grupo Carballoy S.A. DE C.V., by and through their counsel of record, Randy Fairless and Todd Taylor of Johanson & Fairless, and the Defendant, Born Inc., by and through their counsel of record, Randall L. Iola of Ungerman & Iola, and hereby stipulate and agree that the Plaintiff's claims against this Defendant are hereby dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41. Each party is responsible to pay its own attorney's fees, court costs, and expenses. This stipulation of dismissal with prejudice terminates this litigation.

Dated this 13th day of March, 1998.



Randall L. Iola, OBA #13085
UNGERMAN & IOLA
1323 East 71st Street, Suite 300
Tulsa, Oklahoma 74136
(918) 495-0550
FAX (918) 495-0561
Attorney for Defendant, Born Inc.

Respectfully submitted,

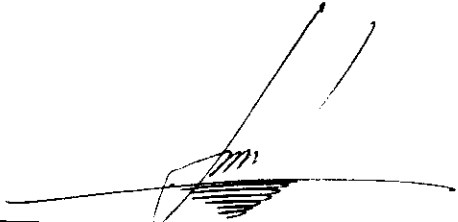

Randy Fairless, TBA #06788500
Todd Taylor, TBA #00785087
JOHANSON & FAIRLESS
1900 West Loop South, Suite 777
Houston, Texas 77027
(713) 572-0547
FAX (713) 572-0558
Attorney for Plaintiff, Grupo Carballoy

STIPULATION OF DISMISSAL WITH PREJUDICE

D:\WordPerf\BORN\CARBALLO\Stipulation of Dismissal with Prejudice

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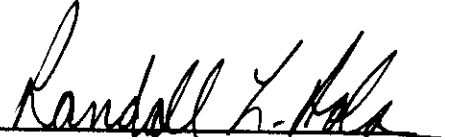


Angel Briones, President
GRUPO CARBALLOY S.A. DE C.V.,
Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of March, 1998, a true and correct copy of the foregoing *Stipulation of Dismissal with Prejudice* was mailed by First Class mail with postage prepaid to the following counsel:

Randy Fairless, Esquire
Todd Taylor, Esquire
Johanson & Fairless
1900 West Loop South, Suite 777
Houston, Texas 77027



Randall L. Iola

8

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RMP CONSULTING GROUP, INC. and
RMP SERVICE GROUP, INC.,

Plaintiffs,

v.

DATRONIC RENTAL CORPORATION,

Defendant/Third
Party Plaintiff,

v.

BANK OF OKLAHOMA, N.A. and
HENRY E. DOSS,

Third Party
Defendants.

ENTERED ON DOCKET

DATE 3-17-98

Case No. 91-C-295-H

FILED

MAR 17 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Report and Recommendation ("Report") of the United States Magistrate Judge filed on September 29, 1997. (Docket # 206). Third Party Plaintiff Datronic Rental Corporation ("Datronic") filed a motion to reconsider which was denied by Judge Joyner on February 19, 1998. The parties have filed objections to the original Report and Defendant Datronic has filed supplemental objections following the denial of the motion to reconsider.

The trial court's consideration of a magistrate's Report and Recommendation is governed by Rule 72(b) of the Federal Rules of Civil Procedure which provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.


Fed. R. Civ. P. 72(b).

Pursuant to Fed. R. Civ. P. 72(b), the Court has made a de novo review of the record, the briefs and arguments of the parties, and the Report. Based upon this review, the Court hereby adopts and affirms Judge Joyner's Report. The Court agrees that the citizenship of the limited partners of Datronic Equipment Income Fund XVI, L.P. ("the Fund"), Datronic's general partner, must be considered to properly determine whether diversity jurisdiction is present. The Court concludes that the Fund is a real and substantial party for purposes of establishing diversity jurisdiction, despite the fact that Datronic has filed a ratification under Rule 17 in which the Fund agrees to be bound by the outcome here.¹

Accordingly, the Court finds that the motion to dismiss for lack of subject matter jurisdiction filed on behalf of Bank of Oklahoma (Docket # 191) and on behalf of RMP Consulting Group, Inc, and Henry Doss (Docket # 190) must be granted for lack of subject matter jurisdiction.

IT IS SO ORDERED.

This 16TH day of March, 1998.


Sven Erik Holmes
United States District Judge

¹ The Court rejects the notion that ratification under Rule 17 is broadly available to non-diverse parties as a means of avoiding the established rule that diversity jurisdiction is present only when all parties to a controversy are citizens of a different state. Indeed, it is settled law that "a primarily local controversy should be tried in the appropriate state forum and that nominal or formal parties, who do not have a significant interest in the outcome of the litigation, should not be able to use the federal courts." 6A Charles Alan Wright *et al.*, Federal Practice and Procedure Civil 2d § 1556, at 422 (2d ed. 1990). Accordingly, the Court agrees with Judge Joyner's conclusion that subject matter jurisdiction must be analyzed independently of the provisions of Rule 19.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 16 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ANDREA GLENN,

Plaintiff,

vs.

STATE OF OKLAHOMA, et al.,

Defendants

Case No. 96-C-384-E

ENTERED ON DOCKET

DATE MAR 17 1998

STIPULATION FOR DISMISSAL OF SUIT

Comes now, Plaintiff, Andrea Glenn, by and through her attorney, Bill V. Wilkinson, of the Wilkinson Law Firm, and pursuant to Rule 41(a)(ii) of the Federal of Civil Procedure, hereby stipulates that defendants, Rita Andrews and Larry Fields, be dismissed without prejudice, and that each party bear their own attorney's fees, costs and expenses. Prior to the refiling in any court the Defendants shall be entitled to their costs pursuant to Rule 41(d) of the Federal Rules of Civil Procedure.

Dated this 16th Day of March, 1998

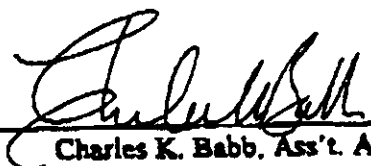
Respectfully submitted,

WILKINSON LAW FIRM

By

Bill V. Wilkinson
Bill V. Wilkinson, OBA #9621
Andrew P. DeCann, OBA #17602
7625 East 51st, Suite 400
Tulsa, OK 74145
Telephone (918) 663-2252
Fax (918) 663-2254
Attorney for Plaintiff

CRJ

By 
Charles K. Babb, Ass't. Attorney General
4545 N. Lincoln Boulevard - Suite 260
Oklahoma City, OK 73105
Telephone (405) 521-4274
Fax (405) 528-1867
Attorney for Defendants Fields and Andrews

TOTAL P.03

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHWESTERN WIRE CLOTH, INC.,)
et al.,)
Plaintiffs,)
vs.)
DERRICK MANUFACTURING CORP.,)
Defendant.)

ENTERED ON DOCKET

DATE 3-16-98

No. 95-C-1184-K

FILED
MAR 18 1998

FINDINGS OF FACT AND CONCLUSIONS OF LAW Phil Lombardi, Clerk
U.S. DISTRICT COURT

Pursuant to Rule 52 F.R.Cv.P., the court hereby enters its Findings of Fact and Conclusions of Law regarding permanent injunction and prejudgment interest.

INJUNCTION

1. On April 24, 1997, the jury entered a verdict finding that the plaintiff, Southwestern Wire Cloth, Inc. and Southwestern Wire Cloth Oilfield Screens, Inc., literally infringed and infringed under the doctrine of equivalents Claim 1 of U.S. Patent Nos. 5,417,858, 5,417,859, and 5,417,793.

2. 35 U.S.C. §283 empowers district courts to "grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such as the court deems reasonable."

3. It is established that an injunction should issue once infringement has been established unless there is a sufficient reason for denying it. W.L. Gore & Associates, Inc. v. Garlock, Inc., 842 F.2d 1275, 1281 (Fed.Cir.1988).

4. However, an injunction imposing a general prohibition

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against infringement is unreasonable. KSM Fastening Systems v. H.A. Jones Co., 776 F.2d 1522, 1526 (Fed.Cir.1985).

5. Applying these principles, the Court hereby issues an injunction in the language included in the Amended Judgment filed contemporaneously herewith.

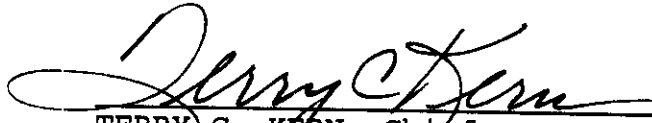
PREJUDGMENT INTEREST

1. Under 35 U.S.C. §284, this Court is empowered to award prejudgment interest.

2. Prejudgment interest is the rule, not the exception. Sensonics, Inc. v. Aerosonic Corp., 81 F.3d 1566, 1574 (Fed.Cir.1996).

3. The Court hereby awards prejudgment interest in the amount set forth in the Amended Judgment filed contemporaneously herewith.

ORDERED this 12 day of March, 1998.


TERRY C. KORN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOUTHWESTERN WIRE CLOTH, INC.,
SOUTHWESTERN WIRE CLOTH
OILFIELD SCREENS, INC.,
Plaintiffs/Counter-Defendants,

vs.

DERRICK MANUFACTURING CORP.,
Defendant/Counter-Plaintiff,

vs.

ROBERT E. NORMAN,
Cross-Defendant.

ENTERED ON DOCKET

DATE 3-16-98

No. 95-C-1184-K

FILED

18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

AMENDED JUDGMENT

Having accepted the jury verdict of April 24, 1997 and having entered its Rule 52 Findings of Fact and Conclusions of Law concerning injunctive relief and prejudgment interest (said Findings and Conclusions being incorporated herein by reference),

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that on plaintiffs' claim for declaratory judgment, judgment is hereby entered in favor of defendant and against plaintiffs.

On defendant's counterclaim, judgment is hereby entered in favor of defendant and against plaintiffs in the sum of \$431,875.00, with post-judgment interest thereon at the rate of 6.06% as provided by law.

Additionally, Derrick shall recover from Southwestern Wire Cloth, Inc. and Southwestern Wire Cloth Oilfield Screens, Inc., prejudgment interest on the jury award as follows:

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1. The prejudgment interest rate shall be the same as the post-judgment interest rate (i.e., 6.06%); and

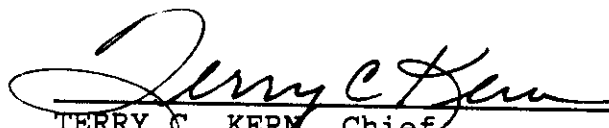
2. The total damages found by the jury should be evenly divided according to the number of months from infringement to verdict, with interest accruing on these disbursements based at the rate of 6.06% compounded quarterly.

Southwestern Wire Cloth, Inc. and Southwestern Wire Cloth Oilfield Screens, Inc., and their officers, agents, servants, employees, attorneys, and those acting in active concert or participation with them are permanently enjoined from making, using, offering to sell, or selling, in the United States, the Southwestern CSS strip screen or any screen assemblies that are no more than colorably different from the CSS strip screen until the expiration or other termination of patent rights in claim 1 of U.S. Patent Nos. 5,417,858, 5,417,859 or 5,417,793. Nothing in this Judgment shall prohibit the use or resale of any CSS strip screen by parties who have purchased the screens from Southwestern Wire Cloth, Inc. and Southwestern Cloth Oilfield Screens, Inc., prior to the date of the verdict in this case, which CSS strip screens are the subject of a damage award.

The Court finds that the damage award of \$431,875 by the jury applies to all infringing screen sales by Southwestern

occurring on or before the April 24, 1997 jury verdict.

ORDERED THIS 12 DAY OF MARCH, 1998


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

J & H FOODS, INC., an Oklahoma
corporation,

Plaintiff,

v.

KAREN JACKSON, an individual, and
TRAVIS JACKSON, an individual,

Defendants.

FILED

MAR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-CV-715-H

ENTERED ON DOCKET

DATE 3-16-98

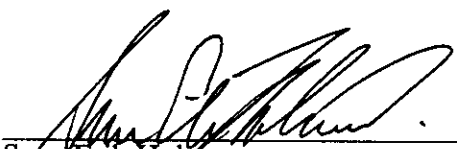
ORDER

On April 7, 1997, Plaintiff provided the Court with a status report in which it stated that this matter was near settlement. On February 9, 1998, Plaintiff filed a notice that stated that Plaintiff dismissed with prejudice all claims and causes of action against Defendants, in the above-entitled action. Defendants have filed no response.

Accordingly, the Court hereby dismisses this matter with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2).

IT IS SO ORDERED.

This 13TH day of March, 1998.


Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDA GIPSON,

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner of
the Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE MAR 16 1998

Case No. 97-CV-250-J ✓

FILED

MAR 16 1998


Phil Lombardi, Clerk
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

Defendant has filed a motion to remand this case pursuant to sentence 6 of 42 U.S.C. § 405(g). Defendant's motion has previously been granted and this action has been remanded to the Commissioner for further administrative action. The Court Clerk shall administratively close this action until the parties notify the Court that the administrative proceedings before the Commissioner are complete.

IT IS SO ORDERED.

Dated this 13th day of ~~January~~ ^{March} 1998.


Sam A. Joyner

United States Magistrate Judge

(12)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILE
MAR 12 1998

CARRIOLE N. HENRY,
SSN: 444-40-4559

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

Phil Lombardi, Clerk
U.S. DISTRICT COURT

97
No. 96-C-160-J

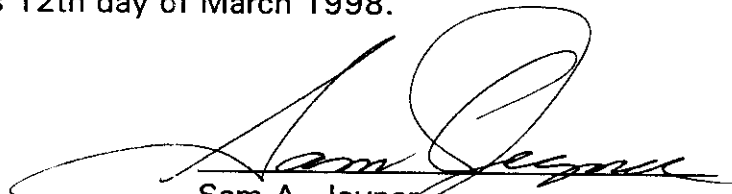
ENTERED ON DOCKET

DATE 3-13-98

JUDGMENT

This action has come before the Court for consideration and an Order reversing and remanding the case to the Commissioner has been entered. Judgment for the Plaintiff and against the Defendant is hereby entered pursuant to the Court's Order.

It is so ordered this 12th day of March 1998.


Sam A. Joyner
United States Magistrate Judge

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

14

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
NORTHERN DISTRICT OF OKLAHOMA

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARRIOLE N. HENRY,
SSN: 444-40-4559

Plaintiff,

v.

KENNETH S. APFEL, Commissioner
of Social Security Administration,^{1/}

Defendant.

No. 97-96-C-160-J /

ENTERED ON DOCKET

DATE 3-13-98

ORDER^{2/}

Plaintiff, Carriole N. Henry, pursuant to 42 U.S.C. § 405(g), appeals the decision of the Commissioner denying Social Security benefits.^{3/} Plaintiff asserts that the Commissioner erred because (1) the ALJ made numerous factual errors in his decision, (2) the ALJ did not properly address Plaintiff's credibility pursuant to Kepler, (3) the ALJ improperly discounted Plaintiff's diagnosis of fibromyalgia, and (4) evidence submitted after the decision of the ALJ was ignored. For the reasons discussed below, the Court **REVERSES AND REMANDS** the Commissioner's decision.

^{1/} On September 29, 1997, Kenneth S. Apfel was sworn in as Commissioner of Social Security. Pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel, Commissioner of Social Security, is substituted for Shirley S. Chater as the Defendant in this action.

^{2/} This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge.

^{3/} Administrative Law Judge Richard J. Kallsnick (hereafter "ALJ") concluded that Plaintiff was not disabled on February 6, 1996. Plaintiff appealed to the Appeals Counsel. The Appeals Counsel declined Plaintiff's request for review on December 20, 1996. [R. at 4].

I. PLAINTIFF'S BACKGROUND

Plaintiff was born on May 7, 1942, and was 53 years old at the time of her hearing before the ALJ. [R. at 36]. Plaintiff did not complete high school, but obtained her GED. [R. at 37].

Plaintiff testified that in March of 1994 she was attending school to become a medical assistant when she fell down a flight of stairs and hurt her back. [R. at 39]. According to Plaintiff, she experienced back pain, hip pain, and leg pain on a regular basis. [R. at 46-48]. Plaintiff additionally testified that she had problems with her hands which began in May or June of 1994. [R. at 41]. Plaintiff stated that her hands were swollen and painful and that it was difficult to write. [R. at 45].

Plaintiff testified that she drove approximately four miles on a daily basis, could carry approximately 11 pounds with her hands (but nothing with her fingers), and was unable to clean or cook. [R. at 37, 48, 50].

An MRI of her lumbar spine on March 29, 1994 indicated that Plaintiff had degenerative disc disease with "mild central disc bulge at L4-S1 level." [R. at 136]. Plaintiff was admitted to Tulsa Regional Medical Center on April 18, 1994 for surgery on her ruptured disc. [R. at 146]. Surgery occurred on April 19, 1994, and Plaintiff was discharged three days after surgery. [R. at 147-149]. Plaintiff continued to complain of pain in her hands, hips, lower legs, ankles, and back. [R. at 123]. An examination on May 11, 1994 reflected that Plaintiff had a normal gait. [R. at 140]. An examination in September 6, 1994 indicated that Plaintiff's gait and station were unremarkable. [R. at 174]. A social security examiner examined Plaintiff on

September 18, 1994. He noted that Plaintiff reported pain and stiffness in her joints and swelling of her hands. The examiner concluded that Plaintiff had slight pain on movement in her right knee, wrists, and thumb and that Plaintiff probably had some form of arthritis. [R. at 183-189]. Plaintiff has been diagnosed with fibromyalgia. [R. at 215, 228, 234]. Plaintiff visited her doctor on several occasions with complaints of pain "all over." [R. at 218, 222]. During a physical therapy evaluation in October of 1995, the evaluator noted that Plaintiff sat for 45 minutes during the interview, was able to stand/walk for 20 minutes, lifted 15 pounds, and carried 11 pounds approximately 200 feet. [R. at 225]. The evaluator noted that Plaintiff began exercising in a pool in August of 1994 and continued the exercises for one year. [R. at 225]. With respect to Plaintiff's "grip strength," the evaluator noted that "hand dynamometer testing was not sensitive enough to register any type of readings exerted by the client. Therapist did note that client did have excessive weakness in the hands and had difficulty doing finger opposition with both of the hands." [R. at 227].

Plaintiff's doctor wrote on October 23, 1995 that Plaintiff had fibromyalgia syndrome which causes pain in multiple areas. In addition he noted that Plaintiff suffered with painful and swollen joints. [R. at 228].

II. SOCIAL SECURITY LAW & STANDARD OF REVIEW

See 20 C.F.R. § 404.1520. Disability under the Social Security Act is defined as the

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if his

physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). The Commissioner has established a five-step process for the evaluation of social security claims.^{4/}

The Commissioner's disability determinations are reviewed to determine (1) if the correct legal principles have been followed, and (2) if the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Bernal v. Bowen, 851 F.2d 297, 299 (10th Cir. 1988); Williams, 844 F.2d at 750.

The Court, in determining whether the decision of the Commissioner is supported by substantial evidence, does not examine the issues *de novo*. Sisco v. United States Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of

^{4/} Step One requires the claimant to establish that he is not engaged in substantial gainful activity (as defined at 20 C.F.R. §§ 404.1510 and 404.1572). Step Two requires that the claimant demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to Step Four, where the claimant must establish that his impairment or the combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if the claimant can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof (Step Five) to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987); Williams v. Bowen, 844 F.2d 748, 750-51 (10th Cir. 1988).

the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

"The finding of the Secretary^{5/} as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

This Court must also determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

^{5/} Effective March 31, 1995, the functions of the Secretary of Health and Human Services ("Secretary") in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. For the purpose of this Order, references in case law to "the Secretary" are interchangeable with "the Commissioner."

III. THE ALJ'S DECISION

The ALJ concluded that Plaintiff was not disabled at Step Five of the sequential evaluation. The ALJ determined that Plaintiff was capable of performing light and sedentary work with some restrictions. Based on the testimony of a vocational expert, the ALJ concluded that Plaintiff was capable of performing substantial gainful activity and therefore was not disabled.

IV. REVIEW

Allegations of Factual Error

Plaintiff alleges that the ALJ's decision contains numerous misrepresentations of the record. Initially, Plaintiff notes that the ALJ refers to an Exhibit (exhibit 19, r. at 183-191) and states that the exhibit reveals that Plaintiff's range of motion was only moderately restricted. Plaintiff states that this was an erroneous conclusion because the only range of motion provided concerned straight leg raising and movement of the right knee. However, four sheets of paper are attached to the doctor's report which record various ranges of motion.

Plaintiff notes that the ALJ, in part, discounted Plaintiff's complaints of pain because allegations of disabling pain for a period of several years is generally accompanied by loss of appetite, muscle atrophy, functional disease, or retarded movement but that none of these symptoms are recorded in the record. Plaintiff initially notes that the record does not state that Plaintiff did not have a loss of appetite. However, this is the ALJ's point. The ALJ was merely pointing out that the record does not reflect that Plaintiff had a loss of appetite. Plaintiff additionally notes

that Plaintiff did not complain of "severe disabling pain" for a period of "several years." Plaintiff notes that her pain did not begin until she fell down a flight of stairs in March of 1994, and that the hearing before the ALJ occurred in October of 1995. Plaintiff asserts that this is a time period of 20 months which does not equate to "several years." Plaintiff's point is well taken. The ALJ noted that severe disabling pain "over a considerable amount of time" is usually accompanied by physical deficits. The ALJ appears to have believed that Plaintiff alleged severe disabling pain for several years. The record does not support this assumption, and therefore the ALJ's analysis is based on a faulty premise.

Plaintiff notes that the ALJ, in his decision stated that "fibromyalgia [is] not felt to be a progressive or crippling disease." Plaintiff refers to an article in the record which suggests that fibromyalgia is as disabling as other rheumatic diseases. First, the record contains nothing suggesting whether fibromyalgia is or is not "progressive or crippling." Therefore the ALJ's assertion is not supported by substantial evidence. Second, the necessity for this statement is puzzling. Disability is determined as of the hearing date. Therefore the potential future of Plaintiff's ability to work given the nature of her disease is not a present concern. If a claimant is not currently disabled but has a progressive disease which will render him/her disabled in the future, a second application for disability should be filed at the time that the claimant is rendered disabled due to the disease. Disability is not granted due to a possibility that an individual may be disabled in the future due to a "progressive and crippling disease."

Plaintiff asserts that the ALJ did not submit appropriate limitations to the vocational expert in the hypothetical question. The ALJ included a limitation based on an inability to perform repetitive movement with the hands. Based on this limitation the vocational expert concluded that Plaintiff could perform substantial gainful activity. Counsel for Plaintiff asked the vocational expert whether an individual whose grip strength in her hands did not register on a hand dynamometer would be able to perform the jobs identified. The vocational expert testified that such a person would not be able to perform the jobs that the vocational expert had identified. The record contains support for the limitation that Plaintiff's grip strength did not register on a hand dynamometer. [R. at 227]. The ALJ does not discuss this evidence in his opinion, or explain why this evidence should be disregarded. On remand, the ALJ should address the evidence regarding Plaintiff's grip strength and specify any limitations which Plaintiff has due to her grip strength. Any such limitations should then be presented to the vocational expert.

Kepler: Evaluation of Plaintiff's Credibility

In Kepler v. Chater, 68 F.3d 387, (10th Cir. 1995), the Tenth Circuit determined that an ALJ must discuss a Plaintiff's complaints of pain, in accordance with Luna, and provide the reasoning which supports the decision as opposed to mere conclusions. Id. at 390-91.

Though the ALJ listed some of these [Luna] factors, he did not explain why the specific evidence relevant to each factor led him to conclude claimant's subjective complaints were not credible.

Id. at 391. The Court specifically noted that the ALJ should consider such factors as:

the levels of medication and their effectiveness, the extensiveness of the attempts (medical or nonmedical) to obtain relief, the frequency of medical contacts, the nature of daily activities, subjective measures of credibility that are peculiarly within the judgment of the ALJ, the motivation of and relationship between the claimant and other witnesses, and the consistency or compatibility of nonmedical testimony with objective medical evidence.

Id. at 391. The Tenth Circuit remanded the case, requiring the Secretary to make "express findings in accordance with Luna, with reference to relevant evidence as appropriate, concerning claimant's claim of disabling pain." Id. at 10.

An ALJ's determination of credibility is given great deference by the reviewing court. See Hamilton v. Secretary of Health & Human Services, 961 F.2d 1495 (10th Cir. 1992). On appeal, the court's role is to verify whether substantial evidence in the record supports the ALJ's decision, and not to substitute the court's judgment for that of the ALJ. Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) ("Credibility determinations are peculiarly within the province of the finder of fact, and we will not upset such determinations when supported by substantial evidence."); Musgrave v. Sullivan, 966 F.2d 1371, 1374 (10th Cir. 1992).

Plaintiff asserts that the ALJ in this case approached Plaintiff's credibility in the same way as the ALJ in Kepler. Plaintiff asserts that such a conclusory evaluation of credibility is improper.

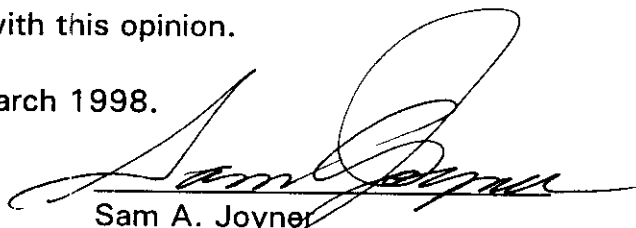
In this case, as in Kepler, the majority of the analysis of Plaintiff's credibility occurs in the head of the ALJ and is not in the ALJ's opinion.

As to the claimant's allegations of totally disabling pain, her testimony was evaluated and compared with prior statements and other evidence. It is the conclusion of the Administrative Law Judge that the pain experienced by the claimant is limiting but, when compared with the total evidence, not severe enough to preclude all types of work. The issue is not the existence of the claimant's pain, but whether it is of sufficient severity as to preclude the claimant from engaging in all types of work activity.

[R. at 20]. The ALJ additionally notes, as discussed above, that complaints of "severe disabling pain" for a period of "several years" would generally produce symptoms such as muscle atrophy, loss of appetite, and retarded movements. The ALJ notes that Plaintiff does not exhibit such symptoms. However, as outlined above, Plaintiff has not alleged severe disabling pain for a period of "several years." Thus the ALJ's conclusions with regard to Plaintiff's lack of muscle atrophy and retarded movements must be discounted. The ALJ's only other references which could suggest that the ALJ was evaluating Plaintiff's complaints of pain are a notation that Plaintiff drives daily and that she has few side-effects from her medication. The ALJ's evaluation of Plaintiff's credibility is simply insufficient. On remand, in accordance with Kepler, the ALJ should discuss the reasons underlying his decision to discount Plaintiff's complaints of disabling pain.

Accordingly, the Commissioner's decision is **REVERSED AND REMANDED** for further proceedings consistent with this opinion.

Dated this 12 day of March 1998.


Sam A. Joyner
United States Magistrate Judge

FILE

MAR 18 1998

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

**Phil Lombardi, Clerk
U.S. DISTRICT COURT**

CHARLES W. O'DELL,

Plaintiff,

v.

**KENNETH S. APFEL,
Commissioner, Social
Security Administration,**

Defendant.

Case No. 96-C-1056-J

ENTERED ON DOCKET

DATE 3-13-98

ORDER

On December 15, 1997, this Court reversed the Commissioner's decision denying plaintiff's claim for Social Security disability benefits and remanded to the Commissioner for further proceedings. No appeal was taken from this Judgment and the same is now final.

Pursuant to plaintiff's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d), and defendant's response, the parties have stipulated that an award in the amount of \$2,520.50 for attorney fees (no costs) for all work done before the district court, is appropriate.

WHEREFORE, IT IS ORDERED that plaintiff's counsel be awarded attorney's fees in the amount of \$2,520.50 under EAJA. If attorney fees are also awarded under 42

U.S.C. §406(b)(1) of the Social Security Act, plaintiff's counsel shall refund the smaller award to plaintiff pursuant to *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir. 1986).

This action is hereby dismissed.


It is so ORDERED THIS 12th day of March 1998.

S/Sam A. Joyner
U.S. Magistrate

SAM A. JOYNER
United States Magistrate Judge

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney


PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street., Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

IN RE:

SAMMIE JO BROOKS,
SSN: 446-52-8826
Debtor.

SAMMIE JO BROOKS,
Appellant,

vs.

UNITED STATES OF AMERICA
EX REL INTERNAL REVENUE
SERVICE,
Appellee.

FILED

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 98-CV-0059-B (E)

ENTERED ON DOCKET

DATE 3-13-98

PROPOSED FINDINGS AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for proposed findings and recommendation. The appeal has been fully briefed, and an advisory hearing was held on March 12, 1998.

The debtor ("Ms. Brooks") appeals from the order of the Bankruptcy Court, Terrence L. Michael, J., denying Ms. Brooks' motion for reconsideration/rehearing of an order dismissing her complaint and adversary proceeding against the United States, ex rel Internal Revenue Service ("United States"). For the reasons discussed below, the undersigned RECOMMENDS that the decision of the Bankruptcy Court be AFFIRMED.

I. Jurisdiction and Standard of Review

The District Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 158. A bankruptcy court's conclusions of law are reviewed de novo, and findings of fact by a clearly erroneous standard. Tulsa Energy, Inc. v. KPL Production Co. (In re Tulsa Energy, Inc.), 111 F.3d 88, 89 (10th Cir. 1997).

II. Facts and Procedural Record

On January 11, 1995, the United States Tax Court--pursuant to an agreement among Ms. Brooks, her ex-husband John M. Brooks, and the IRS--held that Ms. Brooks and John M. Brooks owed a deficiency under I.R.C. §6661 of \$40,947.00, plus \$9,672.75. BCR 6, exhibit "A."¹ Two and one-half years later, on August 29, 1997, Ms. Brooks filed a complaint which alleged that 26 U.S.C. § 6013(e)(D) relieved her, as an innocent spouse, from liability to the United States for the 1987 income tax deficiency. BCR 1.² On December 4, 1997, the Bankruptcy Court granted a motion by the United States to dismiss Ms. Brooks' complaint as moot and issued an order to that effect. BCR 12. Ms. Brooks filed a motion for rehearing/reconsideration, which was denied by the Bankruptcy Court on December 10, 1997. BCR 14, 15. Notice of appeal to the District Court of the

¹ BCR references are to the Bankruptcy Case Record entries by docket number.

² Ms. Brooks had apparently filed a previous Chapter 13 case, in which she argued that "(1) ... the tax lien filed jointly against [Ms. Brooks] and her husband was invalid as to her, due solely because the lien did not list her social security number and (2) ... the IRS' tax claim was not entitled to priority status...." BCR 6 at 2. It was in that proceeding that Ms. Brooks, after an order of summary judgment for the United States, alleged for the first time that the innocent spouse provisions entitled her to relief from the 1987 tax deficiency. Id. The court denied Ms. Brooks' motion for rehearing/reconsideration in that case, stating that "[T]he amount of the tax debt was litigated, negotiated, and finally agreed among John M., Sammie Jo and USA, in the Tax Court case." Id. (quoting Order at p. 5). Ms. Brooks did not appeal this order. The bankruptcy case was later dismissed. The record on appeal does not include any documents from this previous Chapter 13 case, referred to by the United States as Case No. 96-00680-W, Adversary No. 96-0162-W. Although it appears that the issue of innocent spouse relief is res judicata as a result of the prior bankruptcy, the determination of the Bankruptcy Court in that case is not necessary to the undersigned's recommendation today.

order denying Ms. Brooks' motion for rehearing/reconsideration was timely filed on December 22, 1997. BCR 17.

III. Review

A. *Order Denying Reconsideration*

Ms. Brooks argues that her motion to reconsider the Bankruptcy Court's order dismissing the complaint was improperly denied. Ms. Brooks has appealed only the order denying reconsideration and not the order of dismissal. Because Ms. Brooks' appeal does not allege any factual or legal basis as to why the Bankruptcy Court's order denying the motion to reconsider is incorrect, the denial of the motion to reconsider should be affirmed.

Fed. R. Bankr. Pro. 9023 makes Fed. R. Civ. Pro. 59 applicable to cases in bankruptcy (barring certain exceptions not relevant here). A "motion to reconsider" is not among the motions recognized by the Federal Rules of Civil Procedure. A motion filed within 10 days of the entry of judgment will ordinarily be treated as a Rule 59(e) motion to alter or amend judgment. Motions served after that time are construed as Rule 60(b) motions for relief from a judgment or order. See Van Skiver v. U.S., 952 F.2d 1241, 1243 (10th Cir. 1991), cert. denied, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51 (1992). Ms. Brooks' motion to reconsider was filed within ten days, requiring that it be treated as a Rule 59(e) motion to alter or amend judgment.

The standard of review for Rule 59(e) motions requires the undersigned to recommend that the Bankruptcy Court's order denying reconsideration stand unless an abuse of discretion is found. See Committee for First Amendment v. Campbell, 962 F.2d 1517, 1523 (10th Cir. 1992)(applying a Rule 59(e) abuse of discretion standard to review of the denial of a motion for reconsideration); Hancock v. City of Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988)("whether to grant or deny

a motion for reconsideration is committed to the court's discretion"). Absent extraordinary circumstances, "revisiting the issues already addressed is not the purpose of a motion to reconsider...and advancing new arguments or supporting facts which were otherwise available for presentation when the original summary judgment motion was briefed is likewise inappropriate." Van Skiver, 952 F.2d at 1243.

Ms. Brooks presents no allegation of abuse of discretion relating to the denial of reconsideration; she presents only her general disagreement with the decision of the Bankruptcy Court. Ms. Brooks requested no more from the Bankruptcy Court than the revisitation of issues already addressed. The Bankruptcy Court's denial of the motion to reconsider was proper and not an abuse of discretion.

B. Order Dismissing the Complaint

Ms. Brooks would fare no better if she had timely appealed the order dismissing the complaint. Ms. Brooks argues that the innocent spouse provisions of 26 U.S.C. § 6013(e) relieve her of liability for the 1987 tax deficiency.³ However, the amount of her tax was contested before and adjudicated by the United States Tax Court before the commencement of her underlying bankruptcy case. Bankruptcy Code Section 505(a)(2) provides that:

³ 26 U.S.C. § 6013(e) provides that:
Spouse relieved of liability in certain cases--
(1) in General--Under regulations prescribed by the Secretary, if--
(D) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement, then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent such liability is attributable to such substantial understatement.

The court may not so determine --

(A) the amount or legality of a tax, fine, penalty, or addition to tax if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title....

Ms. Brooks had the opportunity to litigate her theory of innocent spouse relief, based upon a provision of the Tax Code, before the Tax Court. That court entered its decision well before the commencement of this bankruptcy case. Bankruptcy Code Section 505(a)(2)(A) specifically prohibits the Bankruptcy Court from readjudicating Ms. Brooks' complaint and the Bankruptcy Court correctly refused to do so.

IV. Recommendation

There was no abuse of discretion in the Bankruptcy Court's denial of Ms. Brooks' motion for reconsideration. Moreover, Ms. Brooks' complaint asserting that the innocent spouse provisions of 26 U.S.C. § 6013(e)(1)(D) provide her relief from liability on the claim for tax deficiency was properly dismissed by the Bankruptcy Court because the amount has already been adjudicated. Bankruptcy Code Section 505(a)(2)(A). The undersigned RECOMMENDS that the decision of the Bankruptcy Court be AFFIRMED.

V. Objections

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise these Proposed Findings and Recommendation or whether to recommit the matter to the undersigned. As part of his review of the record, the District Judge will consider the parties' written objections to these Proposed Findings and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of these Proposed Findings and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. Pro. 72(b). The failure

to file written objections may bar the party failing to object from appealing any of the factual or legal findings in these Proposed Findings and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

DATED this 12th day of March, 1998.

Claire V Eagan
CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

13th Day of March, 1998.
C. Kautsky, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

VICTOR M. CHAPPELLE, an individual
resident of the State of Oklahoma,

Plaintiff,

vs.

VINSON SUPPLY COMPANY,
BRIGGS WEAVER•VINSON, INC.,
and BRIGGS WEAVER, INC.,

Defendants.

Case No. 97-CV-466E(J)

FILED ON DOCKET

DATE 3-13-98

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a)(1), F.R.Civ.P., the parties hereby stipulate that the above-captioned case be dismissed with prejudice because the parties have settled the case.

Respectfully submitted,

Tom Hillis

Kimberly Lambert Love, OBA #10879

R. Tom Hillis, OBA #12338

BOONE, SMITH, DAVIS, HURST
& DICKMAN

500 ONEOK Plaza

100 West Fifth Street

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(918) 587-0000

ATTORNEYS FOR DEFENDANTS.

VINSON SUPPLY COMPANY, BRIGGS

WEAVER•VINSON, INC., BRIGGS

WEAVER, INC. AND SAMMONS

CORPORATION

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C15

Pl

William S. Leach, OBA #14892
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& GABLE, P.L.L.C.
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ATTORNEYS FOR PLAINTIFF, VICTOR M.
CHAPPELLE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

WANDA N. MINER,
SSN: 400-68-8038,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social Security
Administration,

Defendant.

MAR 18 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 96-CV-1145-M

ENTERED ON DOCKET

DATE 3-13-98

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated
this 12th day of MARCH, 1998.


FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED *ef*

MAR 12 1998

CARDTOONS, L.C.,
an Oklahoma Limited
Liability Company,

Plaintiff,

vs.

MAJOR LEAGUE BASEBALL
PLAYERS ASSOCIATION,
an unincorporated association,

Defendant.

Case No. 93-C-576-E ✓

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 3-13-98

J U D G M E N T

In accord with the Order filed this date sustaining the Defendant's Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendant, Major League Baseball Players Association, an unincorporated association, and against the Plaintiff, Cardtoons. Plaintiff shall take nothing of its claim.

DATED, THIS 11th DAY OF MARCH, 1998.

James O. Ellison
JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

168

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

WANDA N. MINER

400-68-8038

Plaintiff,

vs.

Case No. 96-CV-1145-M

KENNETH S. APFEL,¹

Commissioner,

Social Security Administration,

Defendant.

ENTERED ON DOCKET

DATE 3/13/98

ORDER

Plaintiff, Wanda N. Miner, seeks judicial review of a decision of the Commissioner of the Social Security Administration denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c)(1) & (3) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this Order will be directly to the Circuit Court of Appeals.

Plaintiff has appended a 7 1/2 page "medical summary" to her brief, which the Commission has moved to strike as having exceeded the 5 page brief limit established by this Court's scheduling order. Although the Court has "meticulously examine[d] the record," *Broadbent v. Harris*, 698 F.2d 407, 414 (10th Cir. 1983) it has not considered Plaintiff's appendix, in any respect. In the future, if the parties find that

¹ Kenneth S. Apfel was sworn in as Commissioner of Social Security on September 29, 1997. Pursuant to Fed.R.Civ.P. 25(d)(1) Kenneth S. Apfel is substituted for Acting Commissioner John J. Callahan as the defendant in this suit.

² Plaintiff's March 1, 1993 application for disability benefits was denied and was affirmed on reconsideration. A hearing before an Administrative Law Judge ("ALJ") was held July 11, 1994. By decision dated April 17, 1995 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on November 22, 1996. The decision of the Appeals Council represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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the Court's page limit is too restrictive, the appropriate course is to file a motion, with supporting rationale to request permission to exceed the page limit.

The role of the court in reviewing the decision of the Commissioner under 42 U. S. C. §405(g) is limited to determining whether the decision is supported by substantial evidence and whether the decision contains a sufficient basis to determine that the Commissioner has applied the correct legal standards. *Winfrey v. Chater*, 92 F.3d 1017 (10th Cir. 1996); *Castellano v. Secretary of Health & Human Servs.*, 26 F.3d 1027, 1028 (10th Cir. 1994). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Casias v. Secretary of Health & Human Servs.*, 933 F.2d 799, 800 (10th Cir. 1991). Even if the Court would have reached a different conclusion, if supported by substantial evidence, the Commissioner's decision stands. *Hamilton v. Secretary of Health and Human Services*, 961 F.2d 1495 (10th Cir. 1992).

Plaintiff was born August 16, 1947 and was 47 years old at the time of the hearing. She has a high school education and one and a half years business college. She formerly worked as supermarket manager, cashier, and teller. She claims to be unable to work as a result of low back pain, left leg and foot pain and leg numbness. The ALJ determined that although Plaintiff was unable to perform her past relevant

work, she was capable of performing a full range of sedentary work. The case was thus decided at step five of the five-step evaluative sequence for determining whether a claimant is disabled. See *Williams v. Bowen*, 844 F.2d 748, 750-52 (10th Cir. 1988) (discussing five steps in detail).

Plaintiff asserts that the ALJ's determination is not supported by substantial evidence. Specifically, Plaintiff argues that the ALJ: (1) failed to properly analyze the evidence concerning whether she meets a listed impairment, 20 C.F.R. Pt. 404, Subpt. P, App.1.; (2) failed to accord proper weight to the opinions of her treating physician; (3) failed to properly evaluate her credibility; and (4) applied an incorrect legal standard to his finding that she was capable to performing sedentary work. For the reasons expressed below, the Court holds that the existing record and findings will not support the denial of benefits on the ALJ's stated rationale and, therefore the case must be reversed and remanded.

The Listing of Impairments describe, for each of the major body systems, impairments which are considered severe enough to prevent a person from performing any gainful activity. In their briefs before this Court both parties argue their respective positions as to how the evidence either does, or does not, support a finding that Plaintiff's condition meets Listing § 1.05C. which requires the following:

C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and

2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

20 C.F.R. Pt. 404, Subpt. P., App.1., § 1.05C.

The record contains significant medical evidence suggesting that Listing 1.05C may be applicable. Plaintiff suffered a back injury in June, 1992. She was diagnosed with lumbar facet arthropathy at L3-L4 and L4-L5, left, and herniated nucleus pulposus, left and underwent surgery³ in September, 1992. [R. 156-57]. Despite surgery, her pain has persisted. Since the September, 1992 surgery, plaintiff has undergone physical therapy [R. 222, 223], utilized a TENS unit for months [R. 219, 214], and has had epidural steroid injections [R. 238]. Despite these prescribed therapies, her physician continues to document reduced range of motion in the spine [R. 209, 211, 214, 217, 221, 224, 247], motor weakness [R. 239], decreased reflexes in her left knee [R. 209, 211, 214, 217, 221, 224] and hypalgesia (lessened sensitivity to pain) or decreased sensation to pin prick in her left foot and leg [R. 217, 219, 221, 222, 224, 237, 247, 257, 259]. It is not, however, the Court's function to weigh this evidence and substitute its judgment for the Commissioner's.

Concerning the listings, the ALJ stated: "she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4." [R. 22]. This conclusion is drawn without identification of the relevant listing, discussion of the specific medical evidence

³ Lumbar laminectomy--hemilaminectomy at L3, L4, and L5, left with partial medial facetectomies and microdecompression of L4 and L5 nerve roots, and microdisectomy of L3, left. [R. 157].

related thereto, or the rationale for the determination that Plaintiff's impairments do not meet or equal a listed impairment. The Social Security Act requires the Commissioner to make findings of fact based on the evidence and to discuss the evidence, stating the reasons for any unfavorable decision. 42 U.S.C. § 405(b)(1). In *Clifton v. Chater*, 79 F.3d 1007, 1009 (10th Cir. 1996), the Tenth Circuit ruled that a "bare conclusion is beyond meaningful judicial review." Where, as here, the ALJ's decision contains findings not accompanied by specific weighing of the evidence the Court cannot assess whether relevant evidence adequately supports the ALJ's conclusion that Plaintiff's impairments do not meet or equal a listed impairment, or whether the correct legal standards were applied to arrive at that conclusion. *Id.* Applying *Clifton*, this case must be remanded for the ALJ to set out his reasons for his determination that Plaintiff's impairments do not meet or equal a listed impairment.

The ALJ determined that Plaintiff's complaints of disabling pain were not wholly credible. Such a decision is entirely within the province of the ALJ as the Commissioner is entitled to examine the medical record and to evaluate a claimant's credibility in determining whether the claimant suffers from disabling pain. *Brown v. Bowen*, 801 F.2d 361, 363 (10th Cir. 1986). While credibility determinations made by an ALJ are generally treated as binding upon review, the ALJ's decision must contain a discussion of his credibility analysis. The ALJ's decision in this case does not contain a discussion of the ALJ's credibility analysis. Consequently, the Court has no basis upon which to determine whether the decision is supported by

substantial evidence. The case must be remanded for a proper pain and credibility evaluation. *Kepler v. Chater*, 68 F.3d 387 (10th Cir. 1995).

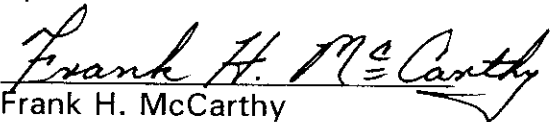
Neurosurgeon Dr. Majzoub is Plaintiff's treating physician. He performed Plaintiff's 1992 back surgery and she was still under his care at the time of the 1994 administrative hearing. He periodically performed objective testing, prescribed pain medication, and referred her to other health care professionals for treatment. Several times in the record Dr. Majzoub expressed the opinion that Plaintiff was disabled from gainful employment. [R. 214-15, 246, 247, 259]. It is well established that the Secretary must give controlling weight to the opinion of a treating physician if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527 (d)(1) and (2); *Kemp v. Bowen*, 816 F.2d 1469 (10th Cir. 1987). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. However, good cause must be given for rejecting the treating physician's views and, if the opinion of the claimant's physician is to be disregarded, specific, legitimate reasons for rejection of the opinion must be set forth by the ALJ, *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987); *Byron v. Heckler*, 742 F.2d 1232, (10th Cir. 1984) .

The ALJ rejected Dr. Mazjoub's opinion primarily because it was rendered in connection with Plaintiff's worker's compensations claim and was understood to be a reference to Plaintiff's inability to perform her most recent job. The ALJ stated: "These statements made to parties outside of the doctor/patient relationship are not

found within this physician's own notes of actual treatment, within a context of spontaneity and candor lending greater reliability to them for the purposes of the Administrative Law Judge in determining the claimant's disability claim." [R. 19-20]. In rejecting Dr. Mazjoub's opinion, the ALJ did not address his objective findings of reduced range of motion in the spine [R. 209, 211, 214, 217, 221, 224, 247], motor weakness [R. 239], decreased reflexes [R. 209, 211, 214, 217, 221, 224] and hypalgesia (lessened sensitivity to pain) or decreased sensation to pin prick in her left foot and leg [R. 217, 219, 221, 222, 224, 237, 247, 257, 259], all of which were documented in the same context as his opinions that Plaintiff was unable to work. Given the ALJ's failure to discuss Dr. Majzoub's opinions in relation to his objective findings, the Court finds that the ALJ failed to give legitimate reasons for rejecting the treating physician's opinion.

For the reasons set forth above, this case is REVERSED and REMANDED for further proceedings.

SO ORDERED this 12th day of March, 1998.


Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

CARDTOONS, L.C.,
an Oklahoma Limited
Liability Company,

Plaintiff,

vs.

Case No. 93-C-576-E

MAJOR LEAGUE BASEBALL
PLAYERS ASSOCIATION,
an unincorporated association,

Defendant.

ENTERED ON DOCKET

DATE 3-13-98

ORDER

This Order addresses the Motion to Dismiss/For Summary Judgment (Docket #146) of the Defendant, Major League Baseball Players Association, an unincorporated association (MLBPA). The Court considers the motion as one for Summary Judgment and shall apply the standard applicable to such motions in its determination. Further, in order to consider all argument and evidence presented, the Court grants Cardtoons' Motion to File Supplemental Brief in Response to MLBPA's Motion to Dismiss/For Summary Judgment (Docket #163).

Legal Analysis

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265, 274 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106

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S.Ct. 2505, 91 L.Ed.2d 202 (1986); Winton Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986).

This action was originally brought by Plaintiff for declaratory judgment that its trading cards featuring parodies of active major league baseball players did not infringe on the publicity rights of members of the MLBPA. Plaintiff also joined in the original complaint claims for injunctive relief and tortious interference with contract. The Court later allowed Plaintiff to file an Amended Complaint which added claims for prima facie tort, libel and negligence.

The Court first addressed Plaintiff's claim that the parody cards did not violate MLBPA's right of publicity. Cartoons prevailed on this issue at both the trial level and on appeal. The claim for injunctive relief has been granted.

There remains for determination the Plaintiff's pendant state tort claims. All of Plaintiff's tort claims arise from the action

of Defendant in sending cease-and-desist letters to Plaintiff and its printer, CHAMPS Marketing, Inc. in which Defendants claimed Plaintiff and CHAMPS were infringing upon the publicity rights of the members of MLBPA.

Defendant urges a motion to dismiss the remaining counts pursuant to Fed.R.Civ.P. 12(b)(6) on the grounds that Defendant's conduct was privileged as a matter of law arising from the right to petition government for redress of grievances guaranteed by the First Amendment to the United States Constitution and thus each count of the Amended Complaint fails to state a claim upon which relief can be granted. Defendant alternatively moves for summary judgment pursuant to Fed.R.Civ.P. 56 urging that no genuine issue exists as to any material fact relating to Plaintiff's claims and that Defendant is entitled to immunity under the First Amendment to the United States Constitution as a matter of law. Plaintiff urges that summary judgment is not proper since there are uncertainties over the predicate facts arising from a conflict in evidence offered by opposing experts on mixed issues of law and fact. Cardtoons' position is that discovery is needed to determine MLBPA's subjective intent in sending the letters.

Neither party's expert opinion is necessary or proper for the resolution of the basic issue nor will they be considered. The issue before the Court is clear cut and unambiguous. The sending of the cease-and-desist letters is undisputed. The only question is whether they were covered by a First Amendment privilege, the same privilege that protects the initiation of litigation. There

need be no further fact-finding on that issue.

The *Noerr-Pennington* doctrine was developed in the context of antitrust law; however it has been applied to other areas as a constitutional defense based upon First Amendment principles.

The United States Supreme Court in Professional Real Estate Investors v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S.Ct. 1920 (1993) held:

"Litigation cannot be deprived of immunity as a sham unless it is objectively baseless. ... Neither *Noerr* immunity nor its sham exception turns on subjective intent alone. See, e.g., Allied Tube & Conduit Corp. V. Indian Head, Inc., 486 U.S. 492, 503, 108 S.Ct. 1931, 1938, 100 L.Ed.2d 497. Rather, to be a "sham," litigation must meet a two-part definition. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation."

The opinion recognizes the extension of the *Noerr-Pennington* doctrine to other areas. The immunity has been extended to efforts to influence adjudicative bodies, including courts. See also California Motor Transport Co. V. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).


Here, the case history establishes objective reasonableness. The Report and Recommendation of the Magistrate, the initial ruling of this Court and the conclusions of the appellate court all acknowledge the reasonableness of MLBPA's position and the fact that the issue presented a close call.

Further, a threat of litigation bears the same petitioning immunity as actual litigation. Coastal States Marketing, Inc. V. Hunt, 694 F.2d 1358 (5th Cir. 1983).

Conclusion

The threats of litigation contained in Defendant's letters are protected under immunity granted by the First Amendment to the United States Constitution. Application of the *Noerr-Pennington* doctrine is appropriate. Plaintiff's remaining claims for Tortious Interference with Contract, Prima Facie Tort, Libel and Negligence must fail as a matter of law. The Motion to Dismiss/For Summary Judgment (Docket #146) is granted in favor of Defendant on all claims. Plaintiff's Motion to File Supplemental Brief (Docket #163) is granted.

It is so ORDERED this 11th Day of March, 1998.



JAMES O. ELLISON, Senior Judge
United States District Court

DATE 3-13-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 13 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

Plaintiff,

vs.

CORNEAL O. HOLMAN

Defendant.

Civil No.: 97-CV-835-H (M)

CLERK'S ENTRY OF DEFAULT

It appearing from the files and records of this Court as of March 12, 1998 and the affidavit of plaintiff, that the defendant, Corneal O. Holman against whom judgment for affirmative relief is sought in this action, has failed to plead or otherwise defend as provided by the Federal Rules of Civil Procedure; now, therefore,

I, PHIL LOMBARDI, Clerk of said Court, pursuant to the requirements of Rule 55(a) of said rules, do hereby enter the default of said defendant.

Dated at Tulsa, Oklahoma on March 13, 1998

PHIL LOMBARDI,

Clerk, U.S. District Court

S. Schwebke

S. SCHWEBKE, Deputy Clerk

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DATE 3-13-98

VALLEY FORGE INS. CO., et al.)
)
 Plaintiffs,)
)
 vs.)
)
 MORRIS DALE VANDERFORD, et al.)
)
 Defendants.)

FILED

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Jerry C Kern

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHAWN E. DANIEL,

Plaintiff,

vs.

BLACK & DECKER (U.S.) INC.,

Defendant.

Case No. 97-CV-283-BU ✓

ENTERED ON DOCKET


DATE 3-13-98

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 11th day of March, 1998.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

United States of America,

Plaintiff

v.

Anthony Lamar Johnson

Defendant

Case No.: 97-CR-019-001-BU/

ENTERED ON DOCKET

DATE 3-13-98

ORDER REVOKING PROBATION

Now on this 26th day of February 1998, this cause comes on for sentencing, concerning allegations that the defendant violated conditions of probation as set out in the Petition on Probation filed December 30, 1997. The defendant is present in person and represented by counsel, Michael A. Abel, the Government by F.L. Dunn, III, Assistant U.S. Attorney, and the United States Probation Office is represented by Frank M. Coffman.

On August 21, 1997, Johnson appeared for sentencing after pleading guilty to Theft of Mail By Officer or Employee, a violation of 18 U.S.C. § 1790. Johnson was sentenced to a five (5) year term of probation. He began serving his term of probation on August 21, 1997.

On December 30, 1997, a petition was filed in the Northern District of Oklahoma alleging that Johnson violated conditions of his probation. On January 12, 1998, the defendant appeared before the Honorable Michael Burrage for a Revocation Hearing on

the violations listed in the Petition on Probation filed December 30, 1997. The Court found that Johnson had violated the conditions of probation as alleged in the Petition on Probation. A Sentencing Hearing was set for January 27, 1998, at 8:45 a.m. The Sentencing Hearing was passed until February 26, 1998, at 3:00 p.m.

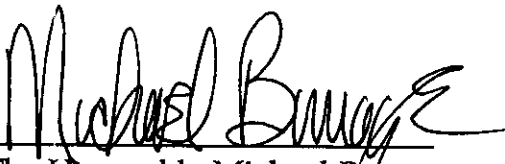
As a result of the Sentencing Hearing, the Court revokes the defendant's probation. Pursuant to the Sentencing Reform Act of 1984, the Court finds that the violations noted in the Petition on Probation filed December 30, 1997, occurred after November 1, 1987, and that Chapter Seven of the U.S. Sentencing Commission Guidelines is applicable. Further, the Court finds that the violations of probation constitute Grade C violations in accordance with USSG § 7B1.1(a)(3), and that the defendant's original Criminal History Category of II is applicable for determining the imprisonment range. In addition, the Court finds that Grade C violations and a Criminal History Category of II establishes a revocation imprisonment range of 4 to 10 months, in accordance with USSG § 7B1.4(a) and 18 U.S.C. § 3565(a)(2). In consideration of these findings and pursuant to U.S. v. Lee, 957 F 2d 770 (10th Cir., 1992) cert. denied, 113 S. Ct. 475 (1992), in which the Circuit determined that the policy statements in Chapter Seven were not mandatory, but must be considered by the Court, the following sentence is ordered:

It is the judgment of the Court that the defendant, Anthony Lamar Johnson, is hereby committed to the custody of the U.S. Bureau of Prisons to be imprisoned

for a term of ten (10) months. The defendant shall serve a two (2) year term of supervised release after his period of incarceration. The previous order of a \$500.00 fine remains in effect and a part of this judgment. The standard conditions of Supervised Release are imposed in addition to the following special conditions:

1. The defendant shall successfully participate in a program of testing and treatment (to include inpatient, if necessary) for drug and alcohol abuse, as directed by the Probation Officer.
2. The defendant shall participate and successfully complete mental health treatment (to include inpatient, if necessary), specifically, a program of anger management, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Officer.
3. The defendant shall participate in and successfully complete domestic violence counseling during supervision.

The defendant is remanded to custody of the U.S. Marshal.


The Honorable Michael Burrage
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 12 1998 *P*

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JANICE DEMARCO,
Surviving Spouse of
RICHARD DEMARCO, Deceased,

Plaintiff,

vs.

ELI LILLY AND COMPANY,

Defendant.

Case No. 94-C-863 BU ✓

Hon. Michael Burrage

ENTERED ON DOCKET

DATE 3-12-98

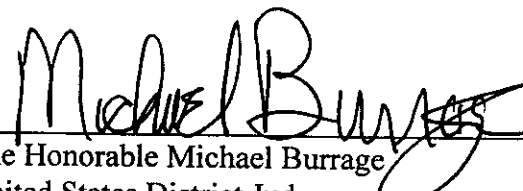
ORDER OF DISMISSAL WITH PREJUDICE

Upon stipulation of the parties,

IT IS HEREBY ORDERED THAT the above-entitled action is dismissed with
prejudice, with each party to bear its own costs.

IT IS FURTHER ORDERED THAT the confidentiality agreement entered into by
the parties and Nancy DeMarco Munson, Richard F. DeMarco, Jr., Gary DeMarco and Janice
DeMarco Diasparra is incorporated herein by reference and this Court thereby retains jurisdiction
over any action regarding enforcement of the same.

Dated: 3-11-98


The Honorable Michael Burrage
United States District Judge

ENTERED ON DOCKET
DATE 3-12-98

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IN RE:

CHAPMAN, CAROLEA WHEELER
a/k/a WHEELER, CAROLEA,

SANDCO, INC.,

Debtors.

Plaintiff,

vs.

CAROLEA WHEELER CHAPMAN
a/k/a CAROLEA WHEELER,
LISA REGAN, and
GRAPHICS INTERNATIONAL, INC.,

Defendants.

F I L E D

MAR 11 1998

U.S. DISTRICT COURT

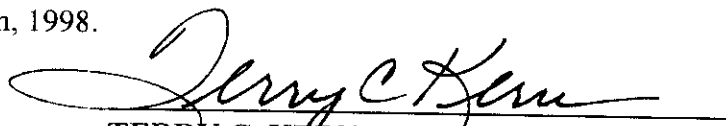
Case No. 97-MC-47-K ✓

(Procedurally consolidated
Bankruptcy Case No. 89-02958-R
Adv. No. 96-0382-R)

**JUDGMENT REGARDING
CAUSES OF ACTION FOR CONVERSION AND ALTER-EGO**

On December 17, 1997, the Bankruptcy Court's Findings of Fact and Conclusions of Law Regarding Causes of Action for Conversion and Alter-ego was filed herein. No objections have been filed. The Court adopts the Bankruptcy Court's findings of facts and conclusions of law. Accordingly, judgment is entered in favor of Defendants Lisa Regan and Graphics International, Inc. with respect to the conversion cause of action, and judgment is entered in favor of Defendants Carolea Wheeler Chapman, Lisa Regan and Graphics International, Inc. with respect to the alter ego cause of action.

Dated this 10th day of March, 1998.


TERRY C. KERN, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 11 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DENNIS HAMMOND, an individual,)
d/b/a Elk River Marine,)

Plaintiff,)

vs.)

No. 95-C-881-E /

CHAMPION BOATS, INC., an)
Arkansas corporation,)

Defendant,)

ENTERED ON DOCKET

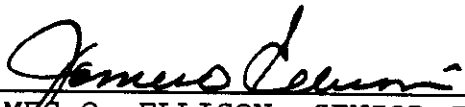
DATE 3-12-98

ADMINISTRATIVE CLOSING ORDER

The Court has been advised by counsel that this action has been submitted for arbitration. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within 60 days that arbitration was not successful and further litigation is necessary.

ORDERED this 11th day of March, 1998.



JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

The undersigned United States Magistrate Judge has reviewed Petitioner's Petition and concludes that Petitioner raises no federal constitutional issues. Furthermore, Petitioner alleges certain errors which Petitioner claims occurred during the sentencing phase of his trial court proceeding. A review of the alleged errors reveals no reversible error. The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On November 17, 1994, Petitioner was charged with two counts of sexual abuse involving a minor that occurred between June and September of 1993. The trial court appointed an attorney for Petitioner and for the two minors involved in the charges. In the Brief attached to his Petition for a Writ of Habeas Corpus, Petitioner acknowledges that he testified on his own behalf at trial and admitted the actions alleged with respect to one of the minors. Petitioner was found guilty of both charges during a jury trial on May 15 and May 16, 1995. The jury recommended a sentence of eight years on each count for a total of 16 years.

Petitioner was sentenced on July 5, 1995. Petitioner testified at the sentencing. He acknowledged his guilt and stated that he had a lot of remorse in connection with his actions. [Transcript of Sentencing, July 5, 1995 at 12-13]. Petitioner testified that he was currently in counseling and that he now understood more about the effect that his actions could have on others. [Transcript of Sentencing, July 5, 1995 at 13]. Petitioner testified that his counselor, Dr. Inbody, had recommended that Petitioner receive a minimum of two years of counseling in the sex offender program and 300 hours of community service. [Transcript of Sentencing, July 5, 1995 at 15].

Monty Veel testified at the sentencing. Mr. Veel described himself as the case worker for the "Olson family" since March of 1994. He testified that Petitioner did not cooperate with him. [Transcript of Sentencing, July 5, 1995 at 30]. Mr. Veel

additionally described Petitioner as being untruthful. Mr. Veel testified regarding some of the incidents which involved Petitioner's children.

One of Petitioner's sons, who was 16 years old at the time of the sentencing testified. [Transcript of Sentencing, July 5, 1995 at 37]. He described some of the incidents which occurred while he was living with his father and step-mother.

The prosecutor offered testimony from two individuals who had served on the jury. The prosecutor indicated that the two former jurors would testify regarding their belief that Petitioner should receive two consecutive eight year sentences. The Judge refused to permit testimony from the two jurors. [Transcript of Sentencing, July 5, 1995 at 36].

The prosecutor argued that Petitioner should be sentenced to two consecutive eight year sentences for a total of sixteen years. The prosecutor argued that Petitioner had a difficult time accepting responsibility for any of his actions and consistently attempted to blame somebody else (whether his father or the Department of Human Services). The prosecutor argued that Petitioner could not be rehabilitated with a simple imposition of 300 hours of community service and therapy, and argued that the Judge should discount the submission of a report by Dr. Inbody. The prosecutor asserted that Petitioner would be willing to lie to attempt to get himself out of trouble. [Transcript of Sentencing, July 5, 1995 at 46]. The prosecutor requested that the Judge look at retribution and the ability to deter Petitioner from committing future similar crimes.

Petitioner's attorney argued that the Judge should impose the two separate eight year sentences consecutively.

An attorney appointed to represent the two minor children requested permission to speak at the sentencing. He argued to the Judge that Petitioner was not a "d-e-f-e-n-d-a-n-t," but that Petitioner was a "p-e-r-v-e-r-t." He asserted that the two minors had been irreparably damaged by Petitioner's actions and urged the Judge to sentence Petitioner to two consecutive eight year terms.

The trial/sentencing Judge listened to the testimony and the arguments of counsel. He concluded that he would follow the jury's recommendation and sentence Petitioner to two consecutive eight year terms (total of sixteen years), and impose several fines (total \$2,007). The Judge noted that not only was Petitioner's conduct illegal and criminal, but that he found it deviant and bizarre. The Judge observed that Petitioner tended to minimize his responsibility for his actions. The Judge additionally informed Petitioner of his right to appeal.

II. ALLEGATIONS OF ERROR

Petitioner appealed the decision of the trial court and sentencing Judge to the Oklahoma Court of Criminal Appeals. Petitioner noted in his brief before the Oklahoma Court that he acknowledged his guilt of the underlying criminal charges, and was appealing only the sentencing by the trial judge.

With respect to the sentencing, Petitioner asserted that due to prosecutorial misconduct, his case should be reversed and Petitioner should be sentenced again. Specifically, Petitioner asserted that the prosecutor engaged in misconduct in

attempting to offer the testimony of two jurors, and in referring to Petitioner as a "liar." In addition, Petitioner argued that the counsel representing the two minor children acted as the equivalent of a prosecutor and committed prosecutorial misconduct by referring to Petitioner as a "pervert." Petitioner urged, on appeal, that the combined effect of these various instances of prosecutorial misconduct required modification of his sentence. Petitioner additionally alleged that the fines imposed by the court should be suspended or reduced.

Petitioner's appeal to the Oklahoma Court of Criminal Appeals was summarily denied on June 20, 1996 by the Court. Petitioner attaches the brief that he filed in the Oklahoma Court of Criminal Appeals to his Petition for a Writ of Habeas Corpus. [Doc. No. 1-1]. Petitioner asserts no additional allegations of error.

III. EXHAUSTION AND EVIDENTIARY HEARING

As a preliminary matter, a court must determine whether a Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). Exhaustion of a federal claim may be accomplished by establishing that either (a) the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) the petitioner had no available means for pursuing a review of a conviction in state court at the time of the filing of the federal petition. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). As outlined above,

each of the claims presented by Petitioner have been previously submitted to and decided upon by the Oklahoma Court of Criminal Appeals.

The granting of an evidentiary hearing is discretionary with the court. Because the issues raised by Petitioner can be resolved on the basis of the record, the court declines to hold an evidentiary hearing. See Townsend v. Sain, 372 U.S. 293, 318 (1963), *overruled in part* by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

IV. RECOMMENDATION REGARDING ALLEGED ERRORS

A. PETITIONER HAS FAILED TO ALLEGE A VIOLATION OF THE CONSTITUTION OF THE UNITED STATES

Petitioner "can obtain federal habeas corpus relief only if his custody is in violation of the Federal Constitution." Mabry v. Johnson, 467 U.S. 504, 505 (1984). See also Townsend v. Sain, 372 U.S. 293, 312 (1963); 28 U.S.C. § 2254(a). Petitioner has not asserted that any of the alleged errors of which he complains involve violations of the United States Constitution. This Court can grant habeas relief only for violations of the federal constitution. Because Petitioner has failed to allege that any of his federal constitutional rights have been violated, this Court should deny Petitioner's requested relief.

B. PETITIONER'S ALLEGATIONS OF PROSECUTORIAL MISCONDUCT DO NOT REQUIRE REVERSAL

As noted, federal habeas relief is available only for violations of the federal constitution. Because Petitioner has asserted no violations of the federal constitution, Petitioner's Petition should be denied. However, assuming Petitioner's claims could

be construed in some way to allege a constitutional violation, Petitioner's claims still lack merit.

Petitioner alleges three instances of prosecutorial misconduct at the sentencing phase of his trial. The jury recommended that Petitioner receive two sentences of eight years, or a total of sixteen years. Petitioner was given a hearing before the state Judge, and the state Judge determined Petitioner's final sentencing. Petitioner claims that the prosecutorial misconduct occurred during the sentencing hearing before the Judge. First, Petitioner alleges that the attempt by the prosecutor to introduce the testimony of two jurors was improper. Second, Petitioner asserts that the prosecutor improperly asserted that Petitioner was a "liar." Third, Petitioner suggests that the attorney for the two minors acted as a prosecutor and therefore was improper in asserting that Petitioner was a "pervert."

None of the parties address whether allegations of prosecutorial misconduct can be appropriately asserted for prosecutorial conduct which occurs outside of the presence of the jury and solely in front of the judge. The general tests for whether prosecutorial misconduct requires a reversal imply the presence of a jury. However, assuming "prosecutorial misconduct" can occur at the sentencing phase of the proceeding when the sentence is determined solely by the judge, the Magistrate Judge concludes that the allegations of misconduct in this case do not require a reversal.

In analyzing whether a petitioner is entitled to federal habeas relief for prosecutorial misconduct, a federal habeas corpus court must determine whether there was a violation of the criminal defendant's federal constitutional rights which "so

infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Coleman v. Saffle, 869 F.2d 1377, 1395 (10th Cir. 1989), cert. denied, 494 U.S. 1090 (1990). In Romano v. Oklahoma, 512 U.S. 1 (1994), the Supreme Court applied this test to remarks made by a prosecutor to the jury during the sentencing phase of a proceeding.

We believe the proper analytical framework in which to consider this claim is found in Donnelly v. DeChristoforo. There we addressed a claim that remarks made by the prosecutor during his closing argument were so prejudicial as to violate the defendant's due process rights. We noted that the case was not one in which the State had denied a defendant the benefit of a specific constitutional right, such as the right to counsel, or in which the remarks so prejudiced a specific right as to amount to a denial of that right. Accordingly, we sought to determine whether the prosecutor's remark "so infected the trial with the unfairness as to make the resulting conviction a denial of due process." We concluded, after an "examination of the entire proceedings," that the remarks did not amount to a denial of constitutional due process.

The relevant question in this case, therefore, is whether the admission of evidence regarding petitioner's prior death sentence so infected the sentencing proceeding with unfairness as to render the jury's imposition of the death penalty a denial of due process.

Romano at 12 (citations omitted).

In this case, Petitioner first alleges that the prosecutor tried to admit the testimony of two jurors. The sentencing Judge refused to admit such testimony and stated that arguments concerning whether Petitioner should serve consecutive or concurrent sentences should be made by counsel, and he would not listen to testimony for the jury.

Petitioner additionally asserts that the prosecutor called him a "liar." During his argument at the sentencing stage, the prosecutor asserted that Petitioner was willing to do anything "to keep himself out of trouble," even lie. [Transcript of Sentencing, July 5, 1995 at 46]. The prosecutor argued as to Petitioner's motivation when Petitioner testified at sentencing that Petitioner felt remorse, understood that he had caused harm, and would be willing to continue counseling. The statement does not require reversal.

Petitioner argues that the attorney representing the minor children committed prosecutorial misconduct when the attorney called Petitioner a "pervert." Initially, the attorney representing the minor children was not a prosecutor. This attorney was appointed by the trial court simply to represent the interests of the children during the proceeding. Regardless, the reference by the attorney does not require reversal.

Petitioner suggests that each error, by itself may not constitute sufficient reversible error, but the accumulation of the errors rendered the sentencing unfair. The United States Magistrate Judge has reviewed the transcript of the sentencing and the briefs filed by the parties, and concludes that the alleged errors were not sufficient to impinge the rights of Petitioner.

C. THE IMPOSED FINES

Petitioner additionally asserted, before the Oklahoma Court of Criminal Appeals that the fines imposed by the trial court should be reduced. Petitioner makes no argument before this Court that the decision of the Oklahoma Court of Criminal Appeals was incorrect or inapposite to established law. Regardless, habeas remedies are

available for individuals "in custody" in violation of federal law. Petitioner makes no argument that the imposition of the fines by the State qualifies for habeas relief.

CONCLUSION

The United States Magistrate Judge recommends that Petitioner's Petition for a Writ of Habeas Corpus be DENIED.

OBJECTIONS

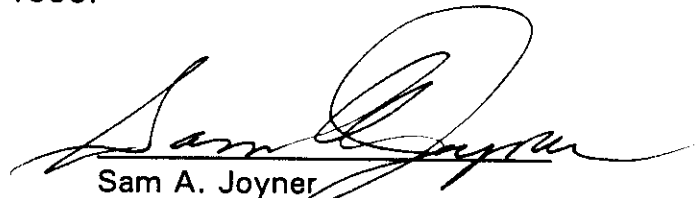
The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review of the record, the District Judge will consider the parties' written objections to this Report and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are ultimately accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 10 day of March 1998.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the

12th Day of March, 1998.
C. P. Kelley, Deputy Clerk


Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 11 1998

USA,

Plaintiff(s),

vs.

\$1,440.00 DOLLARS IN U.S.
CURRENCY, et al,
Defendant(s).

Phil Lombardi, Clerk
U.S. DISTRICT COURT

Case No. 96-C-934-B ✓

ENTERED ON DOCKET

DATE 3-12-98

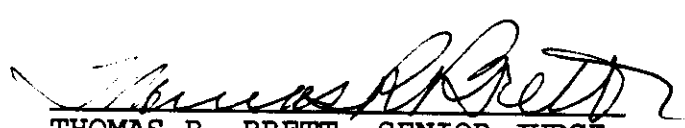
ORDER DISMISSING ACTION
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore, it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this Order by United States mail upon the attorneys for the parties appearing in this action.

IT IS SO ORDERED this 11th day of March, 1998.


THOMAS R. BRETT, SENIOR JUDGE
UNITED STATES DISTRICT COURT

ENTERED ON DOCKET

DATE 3-12-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AZEEZ BAKHSH and RAHIM BAKHSH,)
)
Plaintiffs,)
)
vs.)
)
VICTORIA SMEDLEY,)
)
Defendant.)

No. 97-C-695-K

FILED

ADMINISTRATIVE CLOSING ORDER


Mar 12 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 10th day of March, 1998.


TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 3-12-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN BERNARD GRANT,

Plaintiff,

vs.

JIM NELSON, DONNA BOONE,
ART LYTTLE, HOWARD RAY, and
LARRY FIELDS,

Defendants.

No. 96-CV-866-K

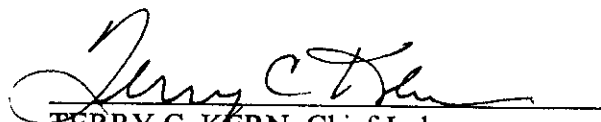
FILED
MAR 11 1998
CLERK OF COURT

ORDER

Before the Court is Plaintiff's motion to dismiss this civil rights action filed pursuant to 42 U.S.C. § 1983 (Docket #14). In his motion, Plaintiff states that "under newly published classification guidelines by the Ok. Dept. of Corrections the issues in the complaint no longer has (sic) a significant effect on the Plaintiff's incarceration to warrant litigating said issues." A review of the record in this case reveals that Defendants have not asserted a counterclaim against Plaintiff, nor have they objected or otherwise responded to the relief requested in the motion. Therefore, the Court finds that Plaintiff's motion should be granted. See Fed. R. Civ. P. 41(a)(2).

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion to dismiss (Docket #14) is **granted** and this action is **dismissed without prejudice**. Any pending motion is **denied as moot**.

SO ORDERED THIS 10 day of March, 1998.


TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

DATE 3-12-98

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LINDA G. GIPSON,

Plaintiff,

v.

KENNETH S. APFEL,
Commissioner of the Social
Security Administration,

Defendant.

FILED

MAR 11 1998

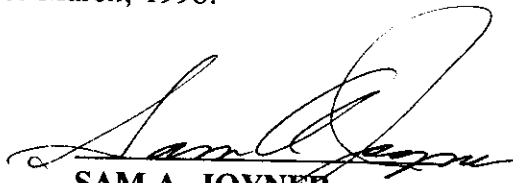
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CASE NO. 97-CV-250-J

ORDER

Upon the motion of the defendant, Commissioner of the Social Security Administration, by Stephen C. Lewis, United States Attorney of the Northern District of Oklahoma, through Cathryn McClanahan, Assistant United States Attorney, and for good cause shown, it is hereby ORDERED that this case be remanded to the Commissioner for further administrative action pursuant to sentence 6 of section 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. 405(g) and 1383(c)(3).


DATED this 11 day of March, 1998.



SAM A. JOYNER
UNITED STATES MAGISTRATE JUDGE

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

A handwritten signature in dark ink, appearing to read 'C. McClanahan', is written over a horizontal line.

CATHRYN McCLANAHAN, OBA #14853
Assistant United States Attorney
333 W. Fourth St., Suite 3460
Tulsa, OK 74103-3809

DATE 3-12-98

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FILED

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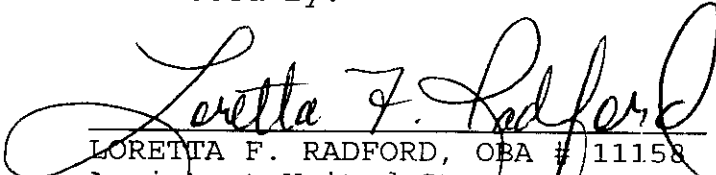
Phil Lombardi, Clerk
U.S. District Court

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that the Plaintiff have and recover judgment against the Defendant, Calvin Lomar Hill, for the principal amount of \$2,722.00, plus accrued interest of \$289.53, plus interest thereafter at the rate of 5 percent per annum until judgment, plus filing fees in the amount of

\$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.

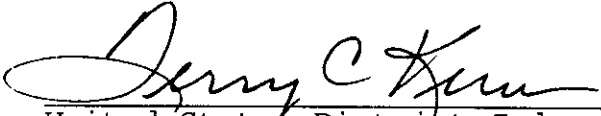

United States District Judge

Submitted By:

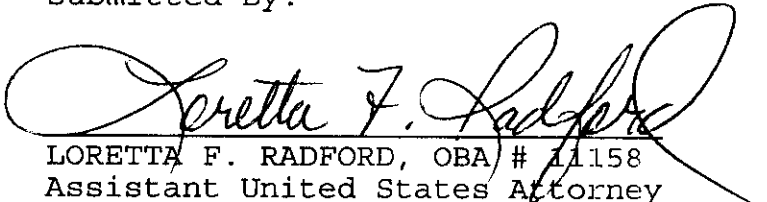

LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/sba

until judgment, plus filing fees in the amount of \$150.00 as provided by 28 U.S.C. § 2412(a)(2), plus interest thereafter at the current legal rate of 5.41 percent per annum until paid, plus costs of this action.


United States District Judge

Submitted By:


LORETTA F. RADFORD, OBA # 11158
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103
(918) 581-7463

LFR/sba

W

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

MAR 9 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHERLYN SNOW, Individually and as
Treasurer, Vice President and Chairman of
the Board of SNOWMEN BROADCASTING,
INC., a Missouri Corporation,

Plaintiff,

vs.

Case No.: 97 CV 1060 H

R.C. AMER, Jr., Individually and as Agent for
VISION COMMUNICATIONS, INC., a Missouri
Corporation, DAVID OSELAND, Individually and
as President of SNOWMEN BROADCASTING,
INC., a Missouri Corporation, and DON
HANCOCK, Individually and as Secretary and Vice
PRESIDENT of SNOWMEN BROADCASTING,
INC., a Missouri Corporation,

Defendants.

ENTERED ON DOCKET

DATE 3-11-98

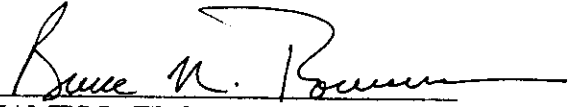
STIPULATION OF DISMISSAL WITHOUT PREJUDICE

2

COMES NOW the Plaintiff, Sherlyn Snow, and hereby stipulates to the dismissal of the above captioned matter, without prejudice to the refiling of same. Plaintiff would advise the Court that Defendants R.C. Amer and Vision Communications, Inc. have been previously dismissed by the Court pursuant to a Motion to Dismiss. Said motion was granted based on lack of personal jurisdiction, without said defendants seeking any affirmative relief or otherwise entering their appearances. Defendants David Oseland and Don Hancock are presently in default, having been served but never entering any appearance, Answering or responding by motion. Consequently, Plaintiff is the only party to this action having appeared in the action as contemplated by Rule 41(a) of the Federal Rules of Civil Procedure.

cks

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Bruce N. Powers", with a long horizontal flourish extending to the right.

JAMES L. EDGAR, OBA # 2617

BRUCE N. POWERS, OBA # 12822

2606 South Sheridan Road, Suite 200

Tulsa, Oklahoma 74129

(918) 834-2600

ATTORNEYS FOR PLAINTIFF